# *United States Court of Appeals*
# *for the Second Circuit*

# JOINT APPENDIX

# No. 76-4085

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 76-4085

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STATE OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Respondents.

B
P/S

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ON PETITION FOR REVIEW OF ORDER OF
INTERSTATE COMMERCE COMMISSION

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## JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
AUG 4 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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August 2, 1976

PAGINATION AS IN ORIGINAL COPY

# JOINT APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 76-4085

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STATE OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Respondents.

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BASIS OF ACTION:
PETITION FOR REVIEW OF ORDER OF
INTERSTATE COMMERCE COMMISSION

---

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

---

## PROTEST AND PETITION FOR SUSPENSION AND INVESTIGATION

---

EFFECTIVE DATE: November 1, 1973

TARIFF REFERENCES: Soo Line Freight Tariff 543+B, ICC 7837

COMMODITY: Wheat in bulk in covered hopper cars, 190,000 pounds per car used, subject to an aggregate minimum weight of 5,000 tons per train.

FROM: Duluth, Minnesota; Minneapolis, Minnesota; Minnesota Transfer, Minnesota; St. Paul, Minnesota and Superior, Wisconsin.

TO: Martins Creek, Pennsylvania

---

Niagara Frontier Transportation Authority
1600 Statler Hilton
Buffalo, New York 14202

American Federation of Grain Millers
Local No. 36
906 Broadway
Buffalo, New York 14212

Grain Elevator Employees
Local No. 1286, I. L. A.
301 Louisiana
Buffalo, New York 14204

International Association of Great
Lakes Ports, 60 Harbour Street
Toronto 117, Canada

International Longshoremen's Association
Local 109, 110 Louisiana Street
Buffalo, New York 14204

Buffalo Area Chamber of Commerce
238 Main Street
Buffalo, New York 14202

Maritime Trades Department
Buffalo Port Council, AFL-CIO
290 Franklin Street
Buffalo, New York 14202

Inland Boatmen's Union, S. I. U.
290 Franklin Street
Buffalo, New York 14202

Buffalo Typographical Union No. 9
290 Franklin Street
Buffalo, New York 14202

PROTESTANTS

BY: James E. Kelly, Esq., General Counsel
(David F. Mix, Esq., Of Counsel)
Attorneys for Protestant
1600 Statler Hilton
Buffalo, New York 14202

DUE DATE:
October 19, 1973

Comes now Niagara Frontier Transportation Authority, a body corporate and politic constituting a public benefit corporation, organized and existing under Chapter 717 of the Laws of 1967 of the State of New York, as amended, with its principal office for the transaction of business at 1600 Statler Hilton in the City of Buffalo, County of Erie and State of New York, (hereinafter referred to as "Protestant Authority"), and respectfully requests that the Commission suspend and enter upon an investigation into the reasonableness and lawfulness of Soo Line Railroad Company's Freight Tariff 543-B, ICC 7837, and in support thereof Protestant Authority avers the following:

## I.

Protestant Authority was created by the New York State Legislature for the purposes of the continuance, further development and improvement of transportation and related services within Erie and Niagara Counties.

The Port of Buffalo ranks 28th in size of the 40 main seaports in the United States and 7th in size of the 54 ports on the Great Lakes. Combined piers can dock approximately 7 ocean-going vessels simultaneously and provide 6,000 feet for general and bulk cargo dockage. There are two terminal buildings, Terminal A provides 118,000 square feet of storage space and contains two overhead cranes with 10 tons capacity each. Terminal B offers 84,000 square feet of high bay storage area for cargo-in-transit. In addition, a 14,000 square foot steel frame, aluminum-walled shed provides a long term housing of bulk cargo that must be protected from the weather. Protestant Authority has also recently prepared a tract of undeveloped land at the Seaway Piers to accommodate bulk cargo. An additional 200 acres is available for future development to make room for the expected growth of bulk cargo into the Port of Buffalo.

Great Lakes' commerce principally consists of the movement of basic bulk commodities with particular emphasis, as far as the Port of Buffalo is concerned, upon the trans-shipment of grain.

Last year grain shipments from United States and Canadian lake ports reached an all-time peak of 965,123,848 bushels, or the equivalent of 28,953,715 net tons. Once again, participation in the grain movement by United States vessels was comparatively paltry. The domestic volume was 60,479,001 bushels which represents 6.27 per cent of the total movement of grain on the Great Lakes. However, it is significant that of such total domestic movement, 100 per cent originated at Duluth-Superior, compared to 95 per cent last year, and 96.5 per cent, being 58,354,766 bushels terminated at Buffalo, New York, compared to 86.4 per cent last year. Buffalo, which boasts the largest flour milling capacity anywhere in the nation, is inextricably dependent upon the grain milling industry and the Great Lakes' vessels for domestic grain movement.

Nearly all of the grain milled at Buffalo moves via lake vessel from Duluth and Superior to Buffalo, where the receiving elevators are lake oriented. In turn, the milling facilities at Buffalo are largely dependent on eastern markets such as Philadelphia and New York. With the demise of export grain, because of direct overseas shipments via the Seaway, Buffalo grain receipts have steadily declined until reaching an all-time low in 1971 of 54,261,253 bushels. In fact, Buffalo receipts of grain have not been lower since 1885 and are virtually limited to milling grains processed into flour at Buffalo.

Now the Soo Line Railroad Company, in conjunction with the Erie Lackawanna Railway Company, desires to further restrict the domestic Great Lakes grain movement by publication of a 72-1/4¢ per CWT unit train rate (as opposed to a single car rate of 115¢) on wheat from Minneapolis, St. Paul, Minnesota Transfer, Duluth, Minnesota and Superior, Wisconsin to Martins Creek, Pennsylvania, subject to annual minimum volume of 100,000 tons. This represents an increase of only 9-3/4¢ per CWT unit train rate and 6-1/2¢ single car rate over the rate structure proposed by the Soo Line Railroad Company last year. At the same time, the Erie Lackawanna Railway Company proposes no unit train service from Buffalo to the New York-Philadelphia area, nor does it propose to reduce the present single car rate from Buffalo to New York and Philadelphia of 53-1/2¢ per CWT on milling grain and grain products. Thus, for an additional 18-3/4¢ over and above the single car rate from Buffalo to New York and Philadelphia, the Soo Line Railroad Company and the Erie Lackawanna Railway Company propose to transport wheat all the way from Duluth-Superior to Martins Creek, Pennsylvania. To merely state the existence of such a differential raises serious legal questions as to its validity and reasonableness.

However, even more significant, the rates proposed above would apply only during the periods from November 1, 1973 through December 14, 1973 and from April 1, 1974 until September 15, 1974, that is, during the Great Lakes' shipping season. While shipping is suspended in the Great Lakes, usually December 15, 1973 through March 31, 1974, the rate for the identical service leaps to 88¢ per CWT. To propose a rate structure which takes advantage of a shipping schedule over which the competitive mode has no control, is the worst kind of discriminatory practice lacking any reasonable justification.

Position statements forwarded to Protestant Authority by the Buffalo Area Chamber of Commerce, American Federation of Grain Millers, Grain Elevator Employees and Buffalo Typographical Union No. 9, who join in this petition, are attached hereto and made a part hereof marked Exhibits A through D inclusive. Statements from the Maritime Trades Department, Inland Boatmen's Union, International Association of Great Lakes Ports and International Longshoremen's Association will be forwarded. A copy of a Resolution passed by the Board of

Commissioners of Protestant Authority at its meeting August 14, 1972 and appearing on the agenda of its meeting scheduled for October 23, 1973 expressing opposition to the proposed rate change are also attached hereto and made a part hereof.

## II.

Protestant Authority, upon information and belief, avers that the protested tariff is unlawful and contrary to national transportation policy because the proposed tariff violates Sections 1(5), 2, 3(4), and 4 of the Act and is contrary to the national transportation policy in that the Erie Lackawanna Railway Company, while serving the Port of Buffalo, does not afford comparable rate reductions or unit train service on wheat interchanged between Protestant Authority's members' vessels and said railroad, nor does it afford comparable rate reductions or unit train service on flour milled in Buffalo and moving to eastern destinations such as New York and Philadelphia. The proposed tariff violates Section 4 of the Act in that the Erie Lackawanna Railway Company has not provided in such tariff for appropriate intermediate rates from Buffalo to Martins Creek, Pennsylvania on either wheat or flour.

## III.

A recent study published in the August, 1972 issue of Traffic Management concludes that rate prejudice against seaway ports stems from inland freight rates

A Department of Transportation study report concerning the effects of inland freight rates and services on the St. Lawrence Seaway concludes that the overall rate levels, when combined with other tariff provisions, do establish a general rate prejudice toward Seaway ports.

Objective of the study was to determine whether the railroad freight rate structure was "unreasonable or unduly prejudicial" to ports located on the Great Lakes and the entire St. Lawrence system.

"Correction of the pervasive disadvantage facing Seaway traffic due to the rate structure," the study report concluded, "can best be remedied through the use of the general investigative power of the Interstate Commerce Commission, rather than through complaints and actions alleging undue preference and prejudice."

## IV.

Everyone today is ecology conscious. Tariff rates which discriminate against water borne commerce are contrary to ecological considerations prevalent in our economy.

It has been stated that modes of transportation account for more than half of the 174 million gallons of petroleum consumed in the United States. At a time when the overall energy supply and demand system is coming under ever sharper scrutiny, it is wise to compare the consumption of fuel and subsequent pollution emission on a ton mile per gallon basis, relative to the shipment of goods by either truck, train or ship. Air freight transport yields up to 10 cargo ton miles per gallon, trucks achieve 54 ton miles per gallon, and railway freight 193 ton miles per gallon. At present, ships operating on the St. Lawrence Seaway obtain from 247 to 1,050 ton miles per gallon, depending on the type of cargo being transported, general cargo being the lowest and bulk being the highest.

## V.

## CONCLUSION

If the proposed tariff is allowed to become effective, it would in all probability mean the end of the flour milling industry in the City of Buffalo with the consequent and devastating financial and human losses to the business and labor community. The feed milling industry would disappear from the Buffalo economic scene inasmuch as it is dependent on the by-products of the flour milling industry. Thousands of jobs are at stake here. Vessel movements would be directly reduced despite the fact that the Great Lakes have been constituted this nation's fourth seacoast since 1970.

It is contended that the protested tariff provisions and the rate thereunder are violative of Sections 1(5) and 15a(2) as well as the national transportation policy, and constitute an unfair and competitive practice which would be unduly prejudicial against the interests of labor and capital with respect to grain milling and movement operations in Buffalo, New York.

Dated at Buffalo, New York this 17th day of October, 1973.

Respectfully submitted,

JAMES E. KELLY, ESQ., GENERAL COUNSEL
(DAVID F. MIX, ESQ., OF COUNSEL)
Attorneys for Protestant Authority
1600 Statler Hilton
Buffalo, New York 14202

## Certificate of Service

I hereby certify that on this 17th day of October, 1973, I served copies of the foregoing Protest and Petition for Suspension and Investigation upon Mr. M. M. Beyer, Manager, Commerce & Tariffs, Soo Line Railroad, Soo Line Building, Minneapolis, Minnesota; Mr. M. F. Coffman, Vice President, Erie Lackawanna Railway Company, Midland Building, Cleveland, Ohio 44115; Mr. R. H. Smith, Vice President, Soo Line Railroad, Soo Line Building, Minneapolis, Minnesota 55440; and upon other persons known to be interested, by mailing the same, postage prepaid, in accordance with Rule 42(c) of the Commission's General Rules of Practice.

DAVID F. MIX, ESQ., OF COUNSEL

BUFFALO
AREA
CHAMBER
OF
COMMERCE

BUFFALO, N. Y.
14202

Area Code 716
852-5400

ACCREDITED
CHAMBER OF COMMERCE
CHAMBER OF COMMERCE
OF THE UNITED STATES

EXHIBIT A

October 15, 1973

Mr. David Mix
Assistant General Counsel
Niagara Frontier Transportation
Authority
1600 Hotel Statler Hilton
Buffalo, New York 14202

Dear Dave:

I refer you to Soo Line Freight Tariff 543-B, in connection with the Erie Lackawanna Railway Company, naming rates on Wheat, in bulk, from Duluth, Minn. and four additional origins to Martin's Creek, Pa. The issuance date was September 28, 1973 and the effective date is November 1, 1973.

As evidenced by our opposition to a similar rate by the same carriers in 1972, the Buffalo Area Chamber reiterates its strong opposition to the proposed rates.

I believe that, again as in the past case, an immediate request should be forwarded to the Interstate Commerce Commission calling for Investigation and Suspension of the rates in question. Area group support on a single petition should suffice and, of course, you may add the Chamber name to the request.

Let's stay in touch.

Sincerely

Ned

Edward T. Brick, Director
Transportation and World Trade

ETBcc
cc - Arthur Lancaster

BUFFALO
AREA
CHAMBER
OF
COMMERCE

BUFFALO, N.Y.
14202

Area Code 716
852-5400

ACCREDITED
CHAMBER OF COMMERCE
CHAMBER OF COMMERCE
OF THE UNITED STATES

EXHIBIT A

August 8, 1972

Mr. Francis D. Flori, Manager
Trade Development
Niagara Frontier Transportation Authority
1600 Hotel Statler Hilton
Buffalo, New York 14202

Dear Fran:

This refers to our recent telephone conversation of the Erie/Lackawanna - Soo proposed grain rate from Duluth, Minnesota to Martins Creek, Pennsylvania.

The Buffalo Area Chamber of Commerce has an interest in this proceeding, based on the following:

1. The Buffalo Area Chamber of Commerce is a corporation duly organized and existing under the laws of the State of New York for, among other things, the furtherance of the community interests in the Buffalo Metropolitan Area and to protect, foster and develop the commercial, industrial, mercantile, financial, manufacturing and general interests of the area.

2. The Buffalo Metropolitan Area consists of Erie and Niagara Counties located at the Western end of New York State on Lake Erie, the Niagara River and Lake Ontario with a population of 1,306,957 (1960 census), now estimated to be 1,349,211.

3. The Buffalo Area Chamber of Commerce which serves this area, believes that the proposed rate, if allowed to become effective, will precipitate numerous similar rates. We feel this, in turn, could have a disasterous effect on Buffalo's flour milling industry. Buffalo presently is the country's largest producer of flour and any move to reduce the status and overall production of this area industry would have highly adverse effects on the region's economy. Reduction of employment, lowering of the financial input to our economy and the extreme negative effect it could have on Port of Buffalo exports are only a few of the reasons we can envision as end results.

We believe continued cooperation among the involved entities will secure a reasonable solution in this matter.

Sincerely

Ned

Edward T. Brick, Director
Transportation and World Trade

[illegible], Vice President
[illegible], Business Representative
JO[illegible], Sergeant-at-Arms
EDW[illegible], Sergeant-at-Arms
JOH[illegible], Recording Secretary

TRUSTEES
CHESTER J. [illegible], Chairman
FRANK FE[illegible]G
ANTHONY ZYGMUNT

HARRY [illegible]
DOMINIC[illegible]
LEO VANDE[illegible]
DOMINIC [illegible]
DONALD [illegible]
RICHARD SO[illegible]
GERALD MARCH[illegible]
RAYMOND KLEFIN[illegible]
ALBERT D'ORAZIO, Internatio[illegible]

EXHIBIT B

**American Federation of Grain Millers**
LOCAL NUMBER 36
906 BROADWAY
BUFFALO, NEW YORK 14212
Affiliated with American Federation of Grain Millers International (AFL-CIO)
Buffalo, N. Y. AFL-CIO Council
New York State AFL-CIO Council

October 1[illegible], 19[illegible]

Niagara Frontier Transportation Authority
Mr. [illegible] Mix
Suite 1600
Statler Hilton Hotel
Buffalo, New York 14202

Dear Mr. Mix,

The Soo Line Railroad has served independent notice that it will publish a unit train rate on wheat and rye from Duluth-Superior and the Twin Cities to Martin's Creek, Pennsylvania.

The announcement of Con[illegible] to build a new mill at [illegible] Creek coupled with the announcement of the publication of this [illegible] train rate has set off a wave of speculations by other mills [illegible] direction of acquiring property close to the heavy areas of [illegible] consumption with a view toward moving their [illegible] facilities [illegible] in operations for delivery of their product by truck. [illegible] become effective, such plans by other mills to build [illegible] mills adjacent to the heavy consumption areas will [illegible] by a number of other mills.

The result would be a [illegible] of the flour milling industry on the waterfront of Buffalo. [illegible] working there and those working in jobs [illegible] activities. Many other industries throughout the [illegible] affected thus making it not only a problem of the Grain Millers [illegible] community problem. It would also affect many affiliates [illegible] in the Maritime Trades Department.

Therefore, Grain Millers Local 36 is in opposition [illegible] unit train rate. If there are any questions, contact Walter.

Sincerely yours,

Matthew J. Gi[illegible]
Business Representative

cc: Mr. A. [illegible]

Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had [illegible] of capital and deserves much the higher consideration. — Abraham Lincoln.

BEST COPY AVAILABLE

DONALD M. MANN, Vice President
211 Hamburg St.
Buffalo, N. Y. 14204
Phone: 856-9731

JOHN ROBERTS, President
131 Hamburg St.
Buffalo, N. Y. 14204
Res. Phone: 853-0574
Office Phone: 856-2386

JAMES FITZGERALD, Recording Secy
209 South Legion Dr.
Buffalo, N. Y. 1[illegible]0
Phone: 823-311[illegible]

**GRAIN ELEVATOR EMPLOYEES**

**LOCAL No. 1286, I. L. A.**

AFFILIATED WITH AFL-CIO

**BUFFALO, NEW YORK**

EXHIBIT C

October 15,1973

Mr. Arthur Lancaster
Trade Development Consultant
Niagara Frontier Transportation Authority
901 Fuhrman Blvd.
Buffalo N.Y. 14203

Dear Mr. Lancaster:

On behalf of the membership of Grain Elevator Employees Local 1286 I.L.A. and myself, I would like to be put on record as opposed to the proposed tariff by the Soo and Erie Lackawana Railroads for shipment of grain from the Duluth - Superior and/or Minneapolis - St.Paul area to Martins Creek Pennsylvania,

Should the announced publication of this new unit train rate become effective it would result in flour mills of Buffalo N.Y. relocating in areas of heavy flour consumption to take advantage of moving their grain supplies via low cost unit train operation from the West and delivery of their products by truck to Eastern consumers.

The result will not only effect Buffalo as a flour milling center but also the employment on the Buffalo Waterfront in General to mention a few, grain elevator, feed mill,grain handlers and flour mill workers, as well as the entire economy of WESTERN NEW YORK as well.

I know you will do your best to prevent this injustice. If I can be of any help feel free to call me.

Yours truly

John R Roberts

John R. Roberts
President

cc: David Mix Attorney N.F.T.A.
George Wessel President Buffalo A.F.L.-C.I.O.
William Gagner President Buffalo Corn Exchange
Honorable Congressman T.J. Dulski
Honorable County Executive Edward V. Regan
Honorable Mayor Stanley M. Makowski

ROBERT M. RUSSELL, President
HAROLD A. CARROLL, Secretary-Treasurer
JAMES F. BAUER, Vice-President

ORGANIZED 1852

BUFFALO
TYPOGRAPHICAL
UNION NO. 9

EXHIBIT D

October 16, 1973

Mr. David Mix, Assistant General Counsel
Niagara Frontier Transportation Authority
16th Floor - Statler Hilton
Buffalo, N.Y. 14202

Dear Mr. Mix:

Once again, we are deeply concerned to learn that the Soo Line Railroad has served notice that it will publish a unit train rate on grain from Duluty-Superior and the Twin Cities to Martin's Creek, Pa., and that the Erie Lackawanna Railroad will join with the Soo Line in this effort.

We are well aware of the ramifications on the Buffalo area if this proposed rate is allowed. The exodus of the flour and feed milling industry from our waterfront could result in the loss of thousands of jobs in that and related fields. The Buffalo area has lost too many companies and jobs in the past few years to accept the consequences that this rate change proposes.

We protest strongly and are unalterably opposed to the proposed Erie Lackawanna and Soo Line Railroads unit train rate change.

Very truly yours,

Robert M. Russell

Robert M. Russell,
President.

290 FRANKLIN STREET, BUFFALO, NEW YORK 14202 • PHONES: 852-2341 -

II. (n) Resolution re Proposed Unit Train Rates from Lakehead to Martin's Creek, Pennsylvania

The Chairman of the Authority explained that he understood that efforts were under way on the part of the Soo and Erie-Lackawanna Railroad to bypass Buffalo insofar as the use of its grain elevators were concerned and that the same lines had filed a proposed tariff which would provide for shipment of grain via railroad car directly from Duluth-Superior and/or Minneapolis-St. Paul to Martin's Creek, Pennsylvania. He asked Mr. Flori to comment on this report and was advised the proposed tariff approved by the ICC would have a very serious impact on the milling industry in Buffalo. The feed mill industry which operates on the by-products of the milling industry would also be seriously impacted as would certain other local industries, namely, bag manufacturers, etc.

After several members of the Board expressed concern over the impact that might be anticipated as far as employment is concerned and the loss of tax base if local elevators were decommissioned, it was moved by Mr. Wolford, seconded by Mr. Surdam that the following Resolution be adopted:

> "RESOLVED, that it is the sense of the meeting of this Board of the Niagara Frontier Transportation Authority that implementation of the proposed shipping rates for transshipment of grain products via train from the Upper Lakes directly to Martin's Creek, Pennsylvania, would have a serious impact upon the economy of the City of Buffalo; and
>
> BE IT FURTHER RESOLVED, that the staff is directed to take such steps as necessary to cooperate with the local governmental, business and labor groups involved in the port industries in opposing approval of the said rates; and

> BE IT FURTHER RESOLVED, that the Chairman of this Authority be and he is hereby directed to take such further steps as in his discretion will serve to support the stand taken by those organizations concerned with the maintenance and viability of the Port of Buffalo."

AYES: MILLER, SURDAM, SCHOELLKOPF, TRIMPER, GRIFFIN, DIEBOLD, KOPCZYNSKI, BELLANCA, WOLFORD

NOES: NONE

CARRIED

There being no further business to come before the Board, the Chairman declared the Meeting adjourned.

16a

10/23/73

I. (a) Approval of Minutes of Regular Meeting held on September 10, 1973

It was moved by Mr. , seconded by Mr. that the Minutes of the Regular Meeting held on September 10, 1973 be accepted and approved.

AYES:

NOES:

CARRIED

II. (a) Resolution re Proposed Unit Train Rates from Lakehead to Martin's Creek, Pennsylvania

The Executive Director explained that the Soo Line Railroad was now proposing to file with the ICC a unit train rate from Duluth, Minnesota to Martin's Creek, Pennsylvania. Such a proposed tariff, if approved by the ICC, would have a serious impact upon the already depressed milling industry in the City of Buffalo. The feed mill industry which operates on the by-products of the grain milling industry would also be seriously impacted as would certain other locally dependent industries such as bag manufacturers.

Last year, the marine related industries and other agencies concerned with the potential economic and financial loss of employment opportunities and tax base if local elevators were decommissioned had successfully fought a similar tariff from Lakehead to Martin's Creek. This year it would appear advisable that our staff be again authorized to cooperate with local governmental, business and labor groups in opposing the proposed tariff and authorization to do so was, therefore, being requested by the Executive Director.

After some discussion, it was moved by Mr. , seconded by Mr. , that the following Resolution be adopted:

> "RESOLVED, that it is the sense of the meeting of this Board of the Niagara Frontier Transportation Authority that implementation of the proposed shipping rates for transshipment of grain products via train from the Upper Lakes directly to Martin's Creek, Pennsylvania, would have a serious impact upon the economy of the City of Buffalo; and
>
> BE IT FURTHER RESOLVED, that the staff is directed to take such steps as necessary to cooperate with the local governmental, business and labor groups involved in the port industries in opposing approval of the said rates; and
>
> BE IT FURTHER RESOLVED, that the Chairman of this Authority be and he is hereby directed to take such further steps as in his discretion will serve to support the stand taken by those organizations concerned with the maintenance and viability of the Port of Buffalo."

AYES:

NOES:

CARRIED

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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# PROTEST AND PETITION FOR SUSPENSION

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| | |
|---|---|
| EFFECTIVE DATE: | November 1, 1973 |
| TARIFF REFERENCE: | Soo Line 543-B, I.C.C. 7837<br>(New) Entire Tariff |
| COMMODITY: | Wheat, In Bulk, Unit Train<br>Grain Tariff |
| APPLICATION: | From Duluth, Minneapolis-St. Paul, Minn. and Superior, Wis., to Martins Creek, Pa. |

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BOARD OF TRADE OF THE
CITY OF CHICAGO

Frank E. Polom,
Executive Director of Transportation
141 West Jackson Boulevard
Chicago, Illinois 60604

Due Date: October 23, 1973

# BEFORE THE

# INTERSTATE COMMERCE COMMISSION

---

## PROTEST AND PETITION FOR SUSPENSION

---

Comes now the Board of Trade of the City of Chicago, hereinafter referred to as protestant or CBOT and protests the proportional rates and their application published in Soo Line Tariff 543-B, I.C.C. 7837, and rules and regulations relating thereto, applicable on wheat, in bulk, from Duluth-Minneapolis-St. Paul-Superior to Martins Creek, Pa., effective November 1, 1973, and requests the Interstate Commerce Commission to suspend the entire schedule and enter into an investigation concerning the lawfulness thereof. In support of its protest this protestant respectfully alleges:

### I

The Board of Trade of the City of Chicago (CBOT) is a corporation created by an act of the Illinois Legislature, with its principal place of business in the City of Chicago, Illinois. It now maintains, and has maintained for more than 125 years, a commodity exchange where its members meet daily for the purpose of buying and selling grain,

grain products, and other non agricultural commodities. Among its 1402 members are terminal storage operators, grain merchandisers, cash grain merchants, processors, millers, exporters, small, medium and large, who operate and maintain facilities, including transit operations, within the switching limits of Chicago and who ship and receive grain and grain products in interstate and foreign commerce.

The Chicago complex of grain storage, marketing and processing facilities, together with its role as an international seaport, provides the largest single market for all grains. Within the switching district there are two wheat mills and a number of grain storage elevators having an aggregate storage capacity of 77 million bushels, 59.6 million bushels represented by 8 elevators located at deep water. These facilities are equipped to receive and ship grain by rail, truck, barge, lake vessel or ocean going vessel. Freight rates play an important role in the marketing of wheat and other grains in the domestic and export marketing channels. Any change in freight rates which will effect the marketing of grain, such as the protested tariff contemplates, is of vital importance to members of this association.

The protested rates were docketed under Western Trunk Line Application X-E-21-9418 but before any action could be taken by that railroad rate making committee, the Soo Line and Erie Lackawanna announced publication of the schedule by independent action in Tariff 543-B, I.C.C. 7837, effective November 1, 1973.

Two levels of rates are published in Item 140, both proportional, applicable only on rail traffic from beyond and only on traffic when stored at the stations from which rates are applicable. The proportional rate of 72.25¢ cwt. (X-299 level) is applicable during the period of November 1, 1973 thru December 14, 1973 and again during period April 1, 1974 and ending September 15, 1974. Since the tariff carries no expiration date, we believe the September date is in error and should be December 14, 1974, normally the closing date of the St. Lawrence Seaway; however, no supplement was received to indicate this is true. The proportional rate of 88¢ cwt. (X-299 level) is applicable during the period beginning December 15, 1973, and ending March 31, 1974. As indicated above, both rates are published as proportional rate factors applicable on wheat in bulk, minimum weight 190,000 lbs. per car used, with the further requirement of an aggregate minimum weight per movement of 5,000 tons, approximately 50 to 52 covered hopper cars. The application of the rates further requires the consignee at destination to receive a total of 3 consecutive movements, consisting of the same cars as in the original movement. Each subsequent shipment must consist of not less than three consecutive movements which consignee may originate at the same or any of the other origins named in Item 140, namely, the stations from which the proportional rates apply. Twenty-four (24) hours free time, exclusive of Saturdays, Sundays or Holidays will be permitted for loading of all the cars sufficient in number to hold the aggregate minimum weight per movement required under the tariff. Thirty-six (36) hours free-time, exclusive of Saturdays, Sundays or Holidays will be permitted for unloading the entire unit train at destination. Failure to load all cars at origin and unload at destination within the prescribed free time results in detention charges of $475.00 for each twenty-four (24) hour period or fraction thereof subsequent to free time at origin and $9.50 per car for each twenty four (24) hour period or fraction thereof subsequent to the free time at destination. Routing from all origins to destination is confined to Soo Line-Chicago-Erie Lackawanna. Intermediate application at destination will apply, and tariff is subject to TPO Maurer's Mileage Tariff 7-C, ICC H-54. Other tariff provisions spell out the requirement of one bill of lading for the entire unit train from one consignor at one location at origin to one consignee at destination. Transit, inspection, weighing, diversion or reconsigment will not be permitted. The proponents reason for the publication of the rates protested herein is to compete with the alternative modes of transportation via water-truck and/or water-rail.

## II

It is this protestant's allegation the rates are unjust and unreasonable in violation of Section 1; unduly prejudicial to elevator operators and wheat millers at Chicago and unduly preferential to grain elevator operators at Duluth-Superior and Minneapolis-St. Paul and the flour miller at Martins Creek, in violation of Section 3 (1); and violate Sections 4 and 6 of the Act.

This publication is very similar to that attempted in September, 1972, which was suspended and assigned I&S Docket No. 8784. Respondent carriers elected not to proceed with the investigation and withdrew the suspended schedule. At that time, respondents declared the necessity to meet water-truck and/or water-rail competition as their justification for the publishing of the rates. We assume this is the case in this instance.

Although the water-truck and/or water-rail competition might possibly exist from Duluth-Superior to Martins Creek, this protestant questions such competitive factors being real from Minneapolis-St. Paul, located 151 miles inland from Duluth, from which respondents have published identical proportional rates as those applicable from Duluth. Rail carriers have the right to meet a real competitive situation with a reasonable and lawful level of rates, but to extend those rates to apply from interior origins far removed from this competitive factor is patently unjust and unreasonable in violation of Section 1 (5). The burden is on respondents to furnish definite proof that such competition does in fact exist not only from Duluth-Superior, but from the interior origins as well and that such competition is substantial.

The failure of respondents to publish properly related flat rates from the proportional rate origins on which to establish a basis for intermediate application at origin precludes the use of the depressed rates by those located at such intermediate origin stations as Chicago. This is unjust and unreasonable in violation of Section 1 (5) and unduly prejudicial in violation of Section 3 (1). The intermediate destination rule (Item 85) is worthless since we know of no operation on the Erie Lackawanna west of Martins Creek which could benefit from the reduced rates.

## III

## THE SECTION 3 (1) ISSUE

The rate of 72.25¢ cwt. is published as a proportional rate restricted to apply on traffic arriving via rail only and stored in transit at the stations from which the proportional rate applies. See Item 140 and Note 1 therein. Routing from the proportional rate origins is published in Item 145 via Soo Line-Chicago, Illinois-Erie Lackawanna to Martins

Creek, Pa. Although Chicago lies directly intermediate in this route, the rate applicable on a movement stored in transit at Chicago is 118¢ cwt. at the X-299 level (37 to Chicago 81 beyond)*. The flat rate from Chicago to Martins Creek is 98¢ cwt. and the re-shipping or proportional rate is 81¢ cwt. ** There are no published domestic multiple carload wheat rates from Chicago to Martins Creek.

CBOT members operating elevator storage facilities at Chicago receive wheat via rail, water and motor carrier and forward wheat by the same modes of transportation. The protested rates apply via a route operating through Chicago; yet, elevators at Chicago are prohibited from the use of this depressed rate, a blatant violation of Section 3 (1) of the Act. The same reasoning which prompted carriers to publish the protested rates from Duluth would also apply to publishing properly related rates from Chicago. Section 3 (1) is specific in its condemnation of any undue or unreasonable preference of, or prejudice to:

> "any particular person......association, locality......transit point......in any respect whatsoever; or to subject any particular person......association, locality......transit point...... or any particular description of traffic to any undue or unreasonable or prejudice or disadvantage in any respect whatsoever."

---

* TPO Lindsay's Tariff WTL-332-11, ICC A-4864; TPO Maurer's C/TN 245-I, ICC C-375, Section 5; Ex Parte 299, ICC 47 et al, 2.6% Table.

** TPO Maurer's C/TN 245-I, ICC C-375.

There is no justification for respondents to arbitrarily deny the elevator operators at Chicago the use of the protested rates or comparable rates to apply from Chicago. We submit to this Commission that the issues in this instance are similar to those in Export Grain and Soybeans, Minnesota to Gulf Ports, 306 I.C.C. 263, where at page 269 the Commission said:

> "Chicago grain dealers compete generally with those at the Twin Cities in the export market. It clearly appears that some of them would be able to use multiple-car rates to gulf ports and have unsuccessfully sought the establishment of such rates, which would have advantages for them similar to those stressed by the Twin Cities dealers: namely, equilization of the handicaps affecting the so-called landlocked elevators, a reduction in the cost of standby rail service needed when barges are not available, and a lower basis of outbound rates on grain received by truck. If the proposed rate were to have the general effect of increasing the volume and profitability of the grain trade at the Twin Cities, as the dealers there hope, Chicago could not justly be denied comparable rate relief."

> "Finding's: We find that the proposed rate is not shown to be just and reasonable, and that it would accord an undue preference to grain dealers at the Twin Cities and subject their competitors at Chicago and other points to undue prejudice. An order will be entered requiring its cancellation and discontinuing the proceeding."

If the protested matter is allowed to become effective, Chicago grain merchandisers and terminal elevator operators would be precluded from selling wheat in the East because of the wide differential between the protested rates and the present rates from Chicago. This is likewise true of the wheat flour millers located within the Chicago Switching District who draw their wheat supplies from the Twin Cities and compete with the flour-mill located at Martins Creek for the demand in the East. The current rate from Duluth-Twin Cities to Martins Creek is 118¢ cwt. (37 to Chicago 81 beyond) at the X-299 level. The proposed rate represents a reduction of 45.75¢ cwt. (118 - 72.25 = 45.75). This is a substantial reduction and would give Martins Creek an unfair advantage over Chicago as well as other milling points located at intermediate stations between the Twin Cities and Martins Creek. The ability of the Chicago merchandisers and elevator operators and the flour millers to remain competitive would be completely eroded by the schedule herein protested. The Commission recognized this in Mayo Shell Corp. v. Baltimore and Ohio Railroad Company, 297 I.C.C. 133 at Page 135, and said:

> "An unjustified difference in freight rates that are factors in the competition between shippers constitutes undue prejudice and preference where, as here, the rates are under the effective control of the participating carrier."

In order to warrant a finding of undue preference and prejudice, there must be shown:

(1) that a difference in the level of rates exists in favor of the preferred points;

(2) that the difference in rates is not justified by transportation conditions;

(3) that there is a carrier or group of carriers which is the common source of the rate prejudice and which effectively participates in both the prejudiced traffic and the preferred traffic;

(4) that the prejudiced party or parties suffer actual or potential injury. See Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5, 10 (1962); State Corp. Comm. of N. Mex. v. Southwestern Motor Frt., 329 I.C.C. 803, 807 (1967).

We submit to this Commission that a disparity does in fact exist in the rate levels. An earlier comparison of the rates applicable via Chicago with the protested matter reveals a disparity of 45.75¢ cwt. which is not justified by transportation conditions. Furthermore, the Soo Line and Erie Lackawanna are the common source of the rate prejudice and participate in both the preferred traffic as well as the prejudiced traffic. The fact that the protested rates would preclude Chicago from competing effectively with Duluth-Superior and Minneapolis-St. Paul, there is grave potential injury to those doing business in the Chicago marketing complex. The carriers have the burden of showing by satisfactory evidence the existence of facts justifying the inequality of treatment. See Cudahy Packing Co. v. Akron, C.& Y.R. Co., 318 I.C.C. 229, 245-246 245-246 (1962).

## IV

## THE SECTION 4 (1) ISSUE

Respondents made no attempt by tariff publication to establish properly related flat or local rates from the proportional rate origins to Martins Creek to prevent fourth section violations and no intermediate origin rule was included in the protested tariff schedule. Nor did the carriers seek proper relief to depart from the requirements of the fourth section of the Act. In Note 1 of Item 140 of the protested tariff, the respondents conveniently excepted the rates from the provisions of Item 80 of WTL Tariff 331-Z, ICC A-4774, and the minimum rate provisions of Item 75 referred to therein. We submit the only relief available to respondents from the minimum rate provision is through a fourth section application seeking relief and approved by the Commission. No such relief was granted. The flat wheat rate from Chicago to Martins Creek is 98¢ cwt. at the X-299 level. Published wheat rates from EL stations extending from Chicago easterly to Decatur, Indiana, range from 98¢ to 93¢ cwt. and apply on wheat shipments in single, multiple or unit train movements. Since the published rate of 72.25¢ cwt. is considerably lower than the rates from intermediate stations located on the Soo-EL route, we submit to the Commission that respondents are in violation of the long and short haul clause of Section 4 (1). Appendix "A" illustrates this situation.

Similarly, respondents need Fourth Section relief to clear all intermediate Soo Line stations located between Duluth-Superior-Minneapolis-St. Paul and Chicago. No such relief was authorized.

Going to origins beyond the stations from which the proportional rates apply, we further submit to this Commission additional fourth section violations would be created if the proposed 72.25¢ cwt. rate is allowed to become effective. Appendix "B" is typical of wheat originating at Leal, N.D., moving in single carloads to Minneapolis or Chicago. Wheat originating at Leal, N.D., stored at Minneapolis and moved in multiple carloads to Martins Creek commands a through rate of 109.25¢ cwt. (93.5 cnts. during period October 1 of each year thru June 30 of following year), X-299 level; 1/ whereas, wheat originating at Leal, N.D., and stored at Chicago and moved in multiple carloads to Martins Creek commands a through rate of 155 cents cwt., X-299 level. 2/ Similar violations would occur from all gathering country origins to Minneapolis since wheat from these origins stored at Chicago would command a higher rate than wheat from these origins stored at Minneapolis. Appendix "C" sets out another example of a Fourth Section violation.

Additionally, it might be pointed out that on any movement under the proposed 72.25¢ cwt. rate from Duluth-Superior and Minneapolis-St. Paul inbound freight bills tendered to respondents to engage the proportional rate must have a paid in freight rate of 25.75¢ cwt., or more,

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1/ Tariff Authority: Soo 87-0, I.C.C. 7772; 543-B, I.C.C. 7837

2/ Tariff Authority: Soo 87-0, I.C.C. 7772; TPO Lindsay's I.C.C. A-4864; TPO Maurer's I.C.C. C-375 to clear the Chicago-Martins Creek flat wheat rate of 98¢ cwt. at the X-299 level.

## MISCELLANEOUS

The protested tariff calls for movement in covered hoppers having capacity of 4500 cubic feet and over (Item 130). This requirement nullifies Item 45 of tariff. There is no provision in the tariff whether or not shipments can be made in shipper owned cars other than the provision in Item 110 making the tariff subject to Agent Maurer's mileage Tariff 7-C, ICC H-54. Going on the assumption the Soo Line and EL will provide the necessary cars, the Commission should be alerted to the restrictions in Service Order 1120 on the use of carrier owned hoppers in unit train operations.

If the hoppers are to be furnished exclusively by the Soo Line, then we question whether that carrier's division of the 72.25¢ rate will be sufficiently compensatory for providing this expensive equipment for such a short haul. The short tariff distance from Minneapolis to Martins Creek via Soo-EL is 1359 miles (457 to Chicago 902 beyond; Soo Tariff 250-H, ICC 7571; EL Tariff 192 ICC 248).

Item 130 requires three consecutive movements to qualify for the rate. We question how respondents plan to collect freight charges within prescribed credit limits.

## CONCLUSION

As pointed out herein, the protested tariff schedule violates the Interstate Commerce Act. The rates are unjust and unreasonable in violation of Section 1 (5) and prefer grain elevator interests located at the origin stations to the prejudice of Chicago elevator operators; prefer the wheat miller at Martins Creek to the prejudice of wheat millers at Chicago in violation of Section 3 (1). Furthermore, the rates violate Sections 4 and 6.

WHEREFORE, your protestant prays that the Commission suspend the operation of the protested tariff and institute an investigation into the lawfulness thereof.

Respectfully submitted

BOARD OF TRADE OF THE
CITY OF CHICAGO

Frank E. Polom
Executive Director of Transportation
141 West Jackson Boulevard
Chicago, Illinois 60604

Dated at Chicago, Illinois
October 19, 1973

## CERTIFICATE OF SERVICE

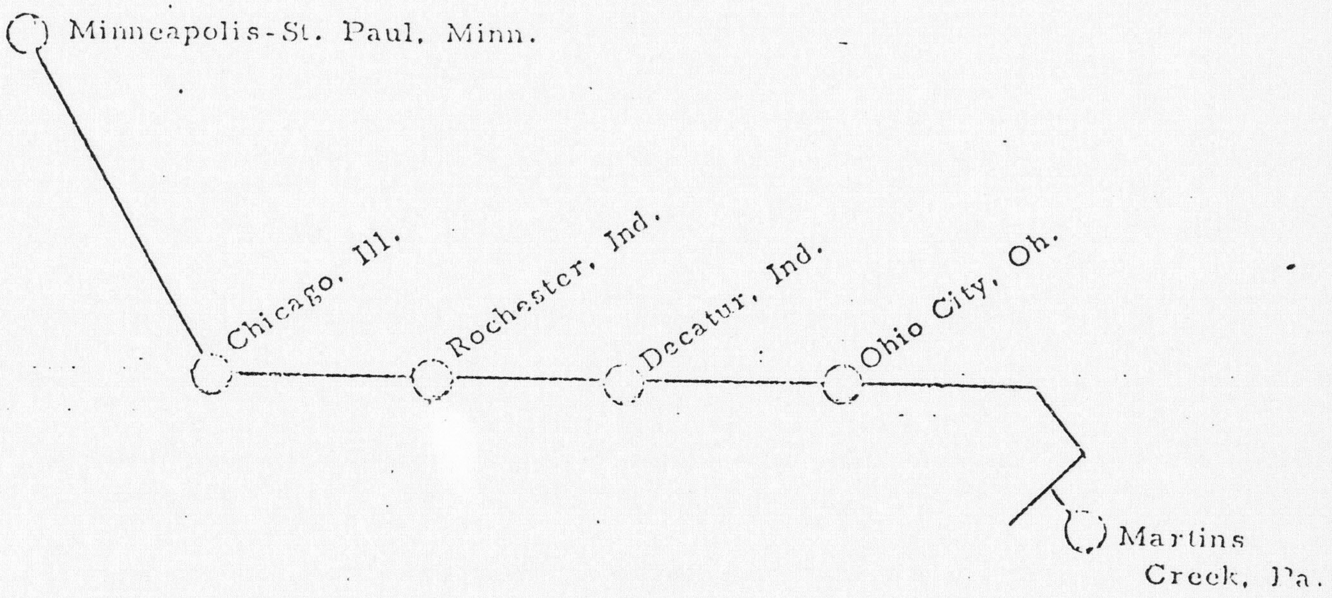
I hereby certify that I have this day served the foregoing document upon Tariff Publishing Officer M.M. Beyer, Soo Line Railroad, Soo Line Building, Minneapolis, Minnesota, 55440, by first-class mail, postage prepaid.

Dated at Chicago, Illinois, this 19th day of October, 1973.

Frank E. Polom
Registered Practitioner

Appendix "A"

## VIOLATION OF SECTION 4 CREATED BY THE PUBLICATION OF THE 72.25 CENT RATE MINNEAPOLIS-ST. PAUL, MINNESOTA TO MARTINS CREEK, PENNSYLVANIA


Minneapolis-St. Paul, Minn.
Chicago, Ill.
Rochester, Ind.
Decatur, Ind.
Ohio City, Oh.
Martins Creek, Pa.

To Martins Creek, Pa.
(X-299 Level Table 2.6%)

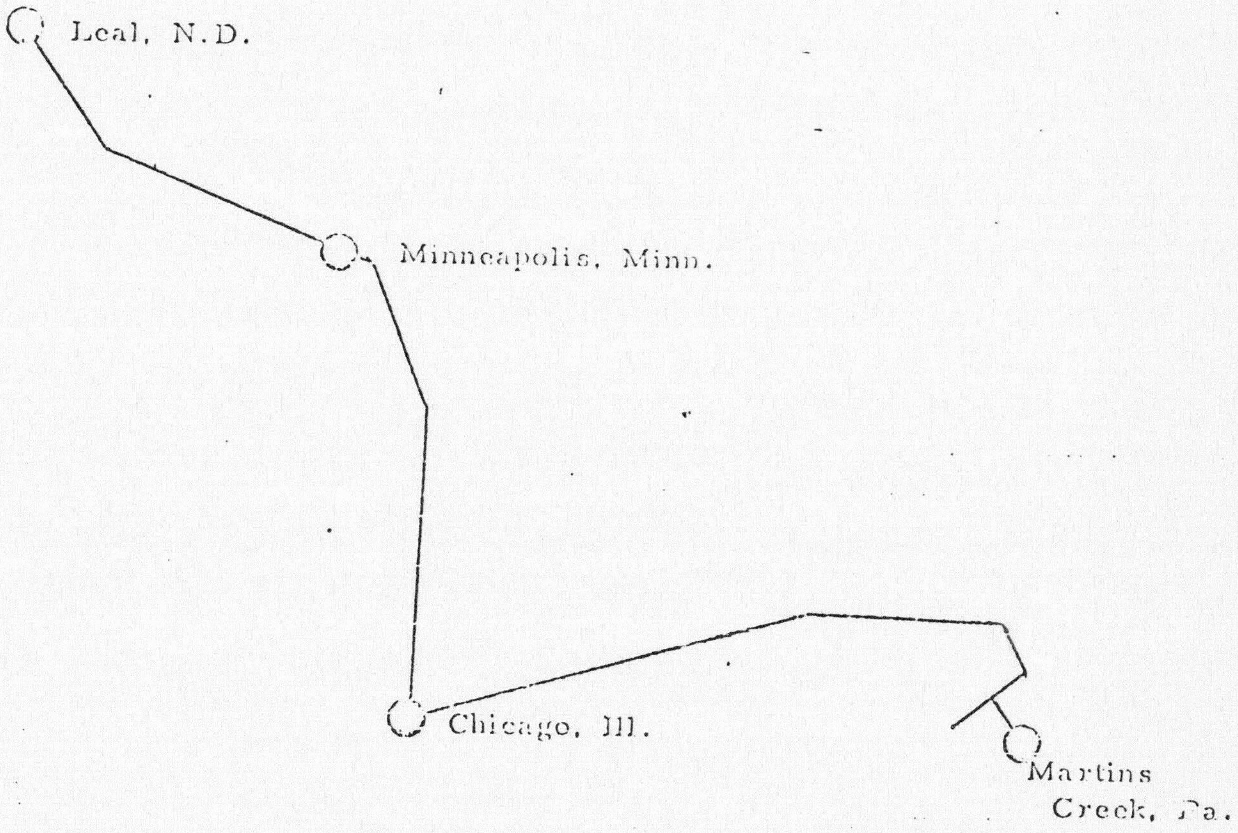
| | | |
|---|---|---|
| From Minneapolis-St. Paul, Minn. (Proposed) | 72.25 | cwt. |
| From Chicago, Ill. (Present Flat) | 98 | cwt. |
| From Rochester, Ind. (Present Flat) | 98 | cwt. |
| From Decatur Ind. (Present Flat) | 91 | cwt. |
| From Ohio City, Oh. (2 Car Wheat Rate) | 60.5 | cwt. |

Route: Soo - EL From Minneapolis-St. Paul
EL From Chicago, Rochester, Decatur and Ohio City

Tariff Auth: Soo Line - 543-B, I.C.C. 7837
T.P.O. B.B. Maurer, C/TN - 245-I, I.C.C. C-375
Sec. 5 and Sec. 1 Supp. 321, Item 1822-D

Appendix "B"

## FOURTH SECTION VIOLATIONS



Via Minneapolis
(X-299-Level TBL, 2.6%)

| | | |
|---|---|---|
| Leal, N.D. to Minneapolis, Minn. | | * 37.00 cwt. |
| Minneapolis, Minn. to Martins Creek, Pa. | | 72.25 cwt. |
| | Total | 109.25 cwt. |

Via Chicago, Ill.
(X-299-Level TBL, 2.6%)

| | | |
|---|---|---|
| Leal, N.D. to Minneapolis, Minn. | | 37 cwt. |
| Minneapolis, Minn. to Chicago, Ill. | | 37 cwt. |
| Chicago, Ill. to Martins Creek, Pa. | | 81 cwt. |
| | Total | 155 cwt. |

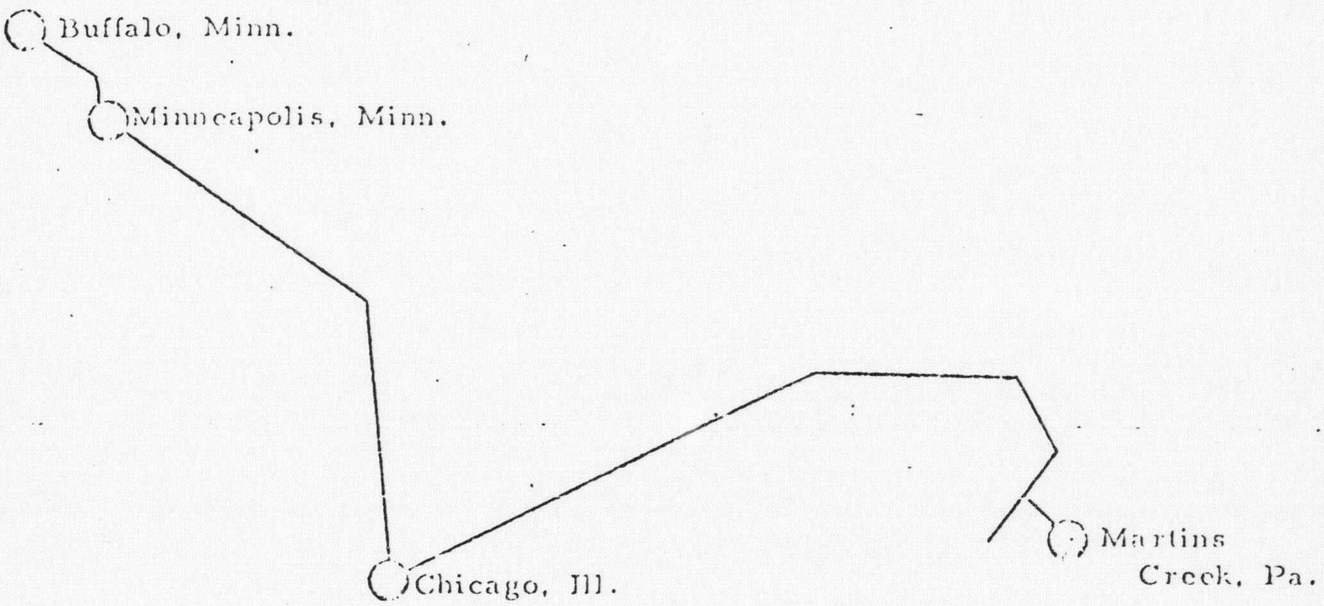
* - Rate applies only during period beginning with July 1 of each year and ending September 30 of the same year. Rate applicable during other period of year is 31 cents cwt. which would make the rate via Minneapolis 93.5 cents cwt. and via Chicago 149 cents cwt.

ROUTE: Soo Line - Chicago - EL

Tariff Auth: Soo Line 87-O, ICC 7772; 543 B,-ICC 7837
T.P.O. Lindsay's WTL 332-H, ICC A-4864
T.P.O. Maurer's TL-CTRTB 245-I, ICC C-375

Appendix "C"

## FOURTH SECTION VIOLATIONS


Buffalo, Minn.
Minneapolis, Minn.
Chicago, Ill.
Martins Creek, Pa.

## UNIT TRAIN RATES ON WHEAT
(X-299 Level Tbl. 2.6%)

| | |
|---|---|
| Buffalo, Minn. to Martins Creek, Pa. | 85.75 cwt. |
| Chicago to Martins Creek, Pa. | 98 cwt. |

ROUTE: Soo Line - Chicago - EL

Tariff Auth: Soo Line 87-O. I.C.C. 7772; 543-B, I.C.C. 7837
T.P.O. Maurer's TL-CTRTB 245-I, I.C.C. C-375

pay

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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PROTEST AND PETITION FOR SUSPENSION
OF GREAT LAKES SHIP OWNERS ASSOCIATION
AND ITS INDIVIDUAL MEMBERS
BISON STEAMSHIP COMPANY
COLUMBIA TRANSPORTATION DIVISION
Oglebay Norton Company
THE COPPER STEAMSHIP COMPANY
ONONDAGA STEAMSHIP COMPANY
ROEN STEAMSHIP COMPANY
STEEL PRODUCTS STEAMSHIP COMPANY

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| | |
|---|---|
| EFFECTIVE DATE: | November 1, 1973 |
| TARIFF REFERENCES: | Soo Line Freight Tariff 543-B, ICC 7837 |
| COMMODITY: | Wheat in bulk in covered hopper cars having capacity of 4,500 cubic feet and over. Minimum weight per movement 5,000 tons. Aggregate minimum weight 15,000 tons. |
| FROM: | Duluth, Minnesota; Minneapolis, Minnesota; Minnesota Transfer, Minnesota; St. Paul, Minnesota and Superior, Wisconsin. |
| TO: | Martins Creek, Pennsylvania |

Robert Branand
2700 Terminal Tower
Cleveland, Ohio 44113

Attorney for Protestants

Due Date: October 19, 1973

Comes now Great Lakes Ship Owners Association and its individual member companies, who are common carriers by water holding certificates of convenience and necessity issued under Part III of the Interstate Commerce Act, authorizing them to transport commodities generally in regulated transportation service between ports on the Great Lakes (hereinafter called "Protestants"), and respectfully request that the Commission suspend and enter upon an investigation into the reasonableness and lawfulness of the Soo Line Freight Tariff 543-B, ICC 7837, and in support thereof Protestants aver:

The protested tariff is unlawful and contrary to national transportation policy in that:

(1) The proposed tariff violates Sections 1(5), 2 and 3(4) of the Interstate Commerce Act and constitutes unfair and destructive competition in violation of national transportation policy in that such tariff fails to recognize the inherent advantage in cost and service characteristic of Great Lakes water transportation and the Commission has no discretionary power to approve any rate which reduces the inherent advantage of water transportation in whole or in part.

(2) The proposed tariff constitutes a destructive competitive practice in that it is unreasonably lower than necessary to meet the competition of competing modes and is unjust and unreasonably low in comparison with other rates on the same commodity for similar distances in the same general territory.

only meets comp.

## ARGUMENT

**The proposed tariff violates Sections 1(5), 2 and 3(4) of the Interstate Commerce Act and constitutes unfair and destructive competition in violation of national transportation policy in that such tariff fails to recognize the inherent advantage in cost and service characteristic of Great Lakes water transportation and the Commission has no discretionary power to approve any rate which reduces the inherent advantage of water transportation in whole or in part.**

The single car rate on the wheat here involved is 115¢ for CWT. Now, under the proposed tariff, by the simple expediency of shipping in multiple car lots a total of 15,000 tons from one consignor to one consignee, the rate would be reduced to 72.25¢ per CWT. It is difficult to envision how the mere fact that one consignor may ship to one consignee wheat in multiple car lots of 15,000 tons or more results in such efficiencies and economies of cost and service as to justify such a reduction in rates.

[illegible]

3 trips in solid train

Were such shipments made with dedicated equipment, such as consumer furnished cars, in shuttle service and in solid trains, then some economies in cost and service might be justified. But that is not this case. In essence, all this tariff provides is for a reduction in rates where a single consignor ships to a single consignee wheat in multiple lots of 15,000 tons or more. A reduction in rates on such a basis is per se unlawful and contravenes national transportation policy.

No one ships [illegible] a single car basis

While Section 15a of the Interstate Commerce Act provides that rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, nevertheless, in determining whether a rate is lower than a reasonable minimum rate, due consideration must be given to the objectives of the national transportation policy. Section 1(5) of the Act requires that all charges made for any service rendered or to be rendered in the transportation of property shall be just and reasonable and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. Section 15(7) of the Act further provides, among other things, that the burden of proof shall be on the carrier to show that a proposed rate change is just and reasonable.

In Grain in Multiple Car Shipments - River Crossings to the South, 321 I.C.C. 582, the Commission indicated, page 597, that ordinarily the most economical mode should be determined by using full costs as a basis. Said the Commission:

> "Even though the fully distributed cost standard is marred by theoretical and practical infirmities, it has been instrumental in preserving the inherent advantages of carriers whose traffic repertoire is so limited that they cannot afford to transport several of their most important commodities at less than the full cost of performing the service." (Emphasis supplied).

The "traffic repertoire" of the average Great Lakes common carrier is extremely limited because they utilize special purpose vessels designed to carry expeditiously the major bulk commodities which move over the Great Lakes. Consequently, the companies operating such vessels cannot transport wheat or any other commodity at less than the full cost of performing the service and remain in business.

Protestants earnestly contend that the subject rate of 72.25¢ per CWT threatens the existence of Great Lakes common carriers, will drive the water rates below a profitable level, and endanger the vessel companies' survival, all of which constitutes unfair and destructive competition in violation of the national transportation policy.

> The proposed tariff constitutes a destructive competitive practice in that it is unreasonably lower than necessary to meet the competition of competing modes and is unjust and unreasonably low in comparison with other rates on the same commodity for similar distances in the same general territory.

The proposed tariff rate of 72.25¢ per CWT is prima facie a destructive competitive practice in violation of national transportation policy since it is obviously below fully distributed costs. Further, by no stretch of the imagination can it be claimed that tendering 15,000 tons justifies a rate reduction from 115¢ to 72.25¢ per CWT. Consequently, the Commission is obligated, in the public interest, to suspend this tariff and enter into an investigation as to the lawfulness thereof, to determine whether or not the proposed tariff is in fact compensatory and whether or not it destroys the inherent advantage of low cost common carrier water transportation in contravention of the national transportation policy.

Respectfully submitted,

GREAT LAKES SHIP OWNERS ASSOCIATION
and its Member Companies

By Robert Branand
Robert Branand

[illegible] steel in Duluth/Buffalo [illegible] + Buffalo [illegible] [illegible]

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## BEFORE THE

## INTERSTATE COMMERCE COMMISSION

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## PROTEST AND PETITION FOR SUSPENSION AND INVESTIGATION

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EFFECTIVE DATE: November 1, 1973

TARIFF REFERENCES: Soo Line Freight Tariff 543-B, ICC 7837

COMMODITY: Wheat in bulk in covered hopper cars having capacity of 4,500 cubic feet and over. Minimum weight per movement 5,000 tons. Aggregate minimum weight 15,000 tons.

FROM: Duluth, Minnesota; Minneapolis, Minnesota; Minnesota Transfer, Minnesota; St. Paul, Minnesota and Superior, Wisconsin.

TO: Martins Creek, Pennsylvania

PROTESTANT: Lake Carriers' Association
1411 Rockefeller Building
Cleveland, Ohio 44113

Scott H. Elder
1411 Rockefeller Building
Cleveland, Ohio 44113

Attorney for Protestant

Due date: October 19, 1973

Comes now Lake Carriers' Association, a non-stock, non-profit corporation, organized and existing under the laws of the State of Ohio, with principal offices at 1411 Rockefeller Building, Cleveland, Ohio 44113 (hereinafter called "Protestant Association"), and respectfully requests that the Commission suspend and enter upon an investigation into the reasonableness and lawfulness of Soo Line Railroad Company's freight tariff 543-B, ICC 7837, and in support thereof Protestant Association avers:

I.

Lake Carriers' Association is a voluntary organization comprised of some 15 managements* owning and/or operating a total of 172 vessels documented under the laws of the United States and engaged in trade and commerce upon the waters of the Great Lakes. The vessels of member companies enrolled in Protestant Association constitute better than 98% of the total trip carrying capacity of the United States flag Great Lakes fleet and the vessels of Protestant Association's members transport better than 95% of the total United States domestic commerce of the Great Lakes.

For the most part, the commerce of the Great Lakes consists of the movement of basic bulk commodities such as iron ore, coal, grain, limestone, sand, cement, and petroleum products. Because of the nature of the bulk commodity movement on the Great

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* Association members are listed in Appendix A.

Lakes, the vessels of Protestant Association's members are of special purpose and design and, therefore, limited for the most part to the movement of these particular bulk commodities, one of the most important of which is grain.

Last year grain shipments from United States and Canadian lake ports reached an all-time peak of 965,123,848 bushels. Regrettably, however, participation by U. S. vessels in the grain movement remained at meager levels, the domestic volume (reserved to U. S. vessels by the cabotage laws) having been only 60,479,001 bushels or 6.27% of the total Great Lakes grain movement. Of this total domestic movement, all originated at Duluth-Superior and 96.5%, or 58,354,766 bushels, terminated at Buffalo, New York. Consequently, to the extent Great Lakes vessels are dependent upon the domestic grain movement, they are inevitably tied to the port of Buffalo, which has the largest flour milling capacity in the nation.

Nearly all of the grain milled at Buffalo moves via lake vessel from Duluth and Superior to Buffalo, where the receiving elevators are lake oriented. In turn, the milling facilities at Buffalo are largely dependent on eastern markets such as Philadelphia and New York. With the demise of export grain, because of direct overseas shipments via the Seaway, Buffalo grain receipts have steadily declined until reaching an all-time low in 1971 of 54,261,253 bushels. In fact, Buffalo receipts of grain have not been lower since 1885 and are virtually limited to milling grains processed into flour at Buffalo.

Now the Soo Line Railroad Company, in conjunction with the Erie Lackawanna Railway Company, desires to further restrict the domestic Great Lakes grain movement by publication of a 72.25¢ per CWT proportional rate (as opposed to a single car rate of 115¢) on wheat from Minneapolis, St. Paul, Minnesota Transfer, Duluth, Minnesota and Superior, Wisconsin to Martins Creek, Pennsylvania, subject to an aggregate minimum weight of 15,000 tons. At the same time, the Erie Lackawanna Railway Company proposes no unit train service from Buffalo to the New York-Philadelphia area, nor does it propose to reduce the present single car rate from Buffalo to New York and Philadelphia of 58¢ per CWT on milling grain and grain products. Thus, for an additional 13.75¢ over and above the single car rate from Buffalo to New York and Philadelphia, the Soo Line Railroad Company and the Erie Lackawanna Railway Company propose to transport wheat all the way from Duluth-Superior to Martins Creek, Pennsylvania. To merely state the existence of such a differential raises serious legal questions as to its validity and reasonableness.

## II.

Protestant Association, upon information and belief, avers that the protested tariff is unlawful and contrary to national transportation policy because:

(1) The proposed tariff violates Sections 1(5), 2 and 3(4) of the Act and is contrary to the national transportation policy in that the Erie Lackawanna Railway Company, while serving the port of Buffalo, does not afford comparable rate reduc-

tions or unit train service on wheat interchanged between Protestant Association's members' vessels and said railroad, nor does it afford comparable rate reductions or unit train service on flour milled in Buffalo and moving to eastern destinations such as New York and Philadelphia.

If [illegible] does not [illegible] in volume shipment and [illegible] high cost [illegible]

(2) The proposed tariff constitutes unfair and destructive competition in violation of national transportation policy in that such tariff fails to recognize the inherent advantage in cost and service, characteristic of Great Lakes water transportation, and the Commission has no discretionary power to approve any type of rate which reduces the inherent advantage of water transportation in whole or in part.

[illegible] requirement [illegible] to show agreement [illegible]

(3) The volume requirement of the proposed tariff institutes in interstate commerce a scheme of agreed guaranteed and/or contract rates destructive of competition in violation of the national transportation policy and thus is unjust, unreasonable, and, per se, unlawful under Section 1 of the Interstate Commerce Act.

## III.

## ARGUMENT

### The Proposed Rate Discriminates Against Water Carriage in Violation of Sections 1(5), 2 and 3(4) of the Act.

The sailing distance from Duluth-Superior to Buffalo, New York is 992 miles. The current vessel rate is 16¢ per bushel on milling grains, including loading and unloading. To this must be added 1¢ per bushel for weighing and inspection

27+4+1 32¢

and 4¢ per bushel for transfer, making a total cost of about 35¢ per CWT delivered into railroad cars at Buffalo elevators. The single car rail rate from Buffalo to the New York and Philadelphia areas, however, is 58¢ per CWT, making a total charge of 93¢ per CWT for a through water-rail movement.

—proposed rate to drop to 66.88¢ to N.J. [illegible]

The Soo Line Railroad Company and the Erie Lackawanna Railway Company now propose a unit train rate on wheat from Duluth-Superior to Martins Creek, Pennsylvania of 72.25c per CWT. While the route of movement over which this rate would apply does not pass directly through the port of Buffalo, at which port the various member companies of Protestant Association connect directly with the Erie Lackawanna Railway Company at elevators owned and operated by various milling companies, the Erie Lackawanna Railway Company does have a direct connection between Buffalo, New York and Martins Creek, Pennsylvania.

The railroad mileage from Duluth-Superior to Martins Creek, Pennsylvania via the Soo Line Railroad Company and the Erie Lackawanna Railway Company is 1,383.8 miles. The railroad mileage from Buffalo, New York to Martins Creek, Pennsylvania is only 327 miles via the Erie Lackawanna Railway Company. Consequently, Great Lakes vessel companies are effectively precluded from competing with the Soo Line Railroad Company and the Erie Lackawanna Railway Company because under the proposed rate the latter companies propose to transport the traffic over an additional distance of 1,056.8 miles for only 13.75¢ more per CWT.

Although Great Lakes vessel companies, distance considered, are the lower cost and more economical carriers, they cannot compete with the proposed rate because the rail rate of the Erie Lackawanna Railway Company for the 327 mile movement beyond Buffalo is being held at 80.27% of the proposed all-rail movement of 1,383.8 miles from Duluth-Superior. Consequently, the inability of Great Lakes vessels to compete with the proposed rate is not attributable to any inherent efficiency in all-rail service vs. lake-rail service. Rather it is the direct product of the Erie Lackawanna Railway Company's discriminatory act in not providing appropriate intermediate unit train rates and service, distance considered, from Buffalo, New York to Martins Creek, Pennsylvania and the vicinity of New York and Philadelphia.

Low
[illegible]
[illegible]

Protestant Association contends that the subject tariff is unlawful and contrary to national transportation policy unless the Erie Lackawanna Railway Company establishes comparably reduced unit train rates and service on ex-lake grain and grain products from Buffalo to the New York and Philadelphia areas. The patent discrimination against water carr iage evidenced here is not beyond the Commission's power to remedy. ICC v. Mechling, 330 U.S. 567, flatly holds that the Commission may not approve rates which do not preserve intact the inherent advantages of cheaper water transportation but discriminate against water carriers and the goods they transport. This is true whether the water carrier is regulated or unregulated under the Interstate Commerce Act. Chicago, Rock Island & Pacific Railway Company vs. United States, 233 F. Supp. 381; James McWilliams Blue Line, Inc. vs. United States, 100 F. Supp. 56, affirmed 342 U.S. 951. The courts have consistently condemned discrimination against water carriers at ports where the inbound and outbound carriers are the same, as well as at ports where the inbound and outbound carriers are different. Aero Transportation Company vs. United States, 176 F. Supp. 411.

The public interest is best served by channeling traffic through the most efficient route of movement, but the Soo Line Railroad Company and the Erie Lackawanna Railway Company have no interest other than to maximize their profits and they are apparently convinced that they can profit more if lake carriage of grain is destroyed. Hence they continue to persist in a rate of 58¢ per CWT on grain and grain products from Buffalo, New York to the New York and Philadelphia areas - a rate which shippers of ex-lake grain must use and which rate is 80.27% of the proposed grain rate from Duluth-Superior - thus effectively precluding lake vessels from participating in the traffic.

Protestant Association does not object to mere hard competition. If the Erie Lackawanna Railway Company contemporaneously with publication of the reduced all-rail rate from Duluth-Superior to Martins Creek, Pennsylvania made a comparable reduction, distance considered, on grain and grain products from Buffalo to Martins Creek, Pennsylvania and the New York and Philadelphia areas, the situation would be different. However, the Erie Lackawanna Railway Company is using its monopoly control over the rates east of Buffalo to force the current grain traffic off the Great Lakes and onto the all-rail route by keeping the ex-lake rate out of Buffalo at such a high level as to preclude the possibility of a lake-rail movement.

### . The Proposed Tariff Fails to Recognize the Inherent Advantage in Cost and Service Characteristic of Great Lakes Water Transportation and the Commission has no Discretionary Power to Approve any Type of Rate which Reduces the Inherent Advantage of Water Transportation in Whole or in Part.

While Section 15a of the Interstate Commerce Act provides that rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, nevertheless, in determining whether a rate is lower than a reasonable minimum rate, due consideration must be given to the objectives of the national transportation policy. Section 1(5) of the Act requires that all charges made for any service rendered or to be rendered in the transportation of property shall be just and reasonable and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. Section 15(7) of the Act further provides, among other things, that the burden of proof shall be on the carrier to show that a proposed rate change is just and reasonable.

The extent to which these particular sections of the Act are qualified by the national transportation policy has been announced in a series of cases culminating with ICC v. New York, N.H. and H.R. Co., 372 U.S. 744, where the Supreme Court said, page 758, that the reference to national transportation policy in Section 15a(3):

> "* * * was to emphasize the power of the Commission to prevent the railroads from destroying or impairing the inherent advantages of other modes. And the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed cost, forced a smaller competing lower cost mode to go below its own fully distributed cost and thus perhaps to go out of business."

There can be no question, then, but that it is the duty of the Commission to preserve the inherent advantage of a particular mode of transportation. Schaffer Transport Co. v. United States, 355 U.S. 83; St. Louis-San Francisco Railway Co. v. United States, 207 F. Supp. 293. The Commission may not approve rates which do not preserve the inherent advantages of cheaper water transportation. ICC v. Mechling, supra.

In Grain in Multiple Car Shipments - River Crossings to the South, 321 I.C.C. 582, the Commission indicated, page 597, that ordinarily the most economical mode should be determined by using full costs as a basis. Said the Commission:

> "Even though the fully distributed cost standard is marred by theoretical and practical infirmmities, it has been instrumental in preserving the inherent advantages of carriers whose traffic repertoire is so limited that they cannot afford to transport several of their most important commodities at less than the full cost of performing the service." (Emphasis supplied).

In the instant case the "traffic repertoire" of the average Great Lakes bulk cargo vessel is extremely limited because they are special purpose vessels designed to carry expeditiously the three major bulk commodities which move over the Great Lakes, namely, iron ore, coal and grain. Consequently, the companies operating such vessels cannot transport grain at less than the full cost of performing the service and remain in business. Moreover, vessel rates, unlike rail rates, are determined in the open market on the basis of the law of supply and demand in an atmosphere of free and open competition.

It is common knowledge that in recent years on the Great Lakes grain rates have been depressed due to vigorous Canadian and overseas flag competition. It is logical to assume, therefore, that the vessel companies' cost of performing the service is very little below the prevailing vessel rates. Obviously, as a transportation mode the inherent cost advantage lies with the water carrier because it is performing a service over a distance of 992 miles at a rate of 16¢ per bushel, and the Commission is duty bound to preserve that advantage.

With the rail rate on milling grains and grain products from Buffalo to the New York and Philadelphia areas remaining at the present 58¢ per CWT, however, the Great Lakes vessel operator, to even meet the rate proposal here under consideration, would have to reduce the vessel rate from 35¢ per CWT to 14.25¢ per CWT, a reduction equivalent to 59.3%. To merely state the proposition makes it evident that the vessel operator would be driven below his fully distributed costs and, in all probability, could not even meet out-of-pocket costs.

Consequently, while the vessel owner enjoys the inherent advantage of low-cost service which the national transportation policy seeks to protect, the Soo Line Railroad Company and the Erie Lackawanna Railway Company would destroy that advantage by maintaining the artificial rate structure on ex-lake grain and grain products which exists east of Buffalo. They are able to do this only because the lake vessel must connect with the rails.

Were the vessel companies not dependent on the rails to reach the ultimate consumer and were the Commission confronted with a situation of pure competition between two competing modes, there is no question but that the water carrier would have the cost advantage in the movement of bulk commodities. The railroads should not now be permitted to use their monopolistic power to thwart the public from receiving the benefits of low-cost Great Lakes vessel transportation simply because the rails must also be utilized for a portion of the movement.

If it is feasible to operate a 5000 ton train from Duluth-Superior to Martins Creek, Pennsylvania and thereby reduce the rate from 115¢ per CWT to 72.25¢ per Cwt, it is just as feasible to operate heavy trains from Buffalo to the New York and Philadelphia areas under the same terms and conditions of service at an even greater reduction in rate, distance considered. The Commission has always endeavored to ascertain, in the light of all relevant circumstances, whether or not the predominant motive in setting a rate is predatory in nature. Meats, Fruits, Vegetables - TOFS - Transcontinental, 316 I.C.C. 585. Certainly reduction of the all-rail rate on milling grains from Duluth-Superior to Buffalo from 115¢ per CWT to 72.25¢ per CWT would not be a rational economic decision in the absence of Great Lakes vessel competition which is the announced Commission test of predatory motives. Reduced Transcontinental Lumber Rates, 318 I.C.C. 850.

In analyzing whether or not certain competitive practices are, in fact, unfair or destructive, the Supreme Court in the New Haven case, supra, established certain guide lines. It was there said, page 759, that the principal purpose of the reference to national transportation policy in Section 15a(3) of the Act was:

> "* * * to prevent a carrier from setting a rate which would impair or destroy the inherent advantage of a competing carrier, for example, by setting a rate below its own fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic."

Protestant Association earnestly contends that the subject rate of 72.25¢ per CWT threatens the existence of Great Lakes carriers, will drive the water rates below a profitable level, and endanger the vessel companies' survival, all of which constitutes unfair and destructive competition in violation of the national transportation policy.

### The Annual Volume Requirement of the Proposed Tariff Institutes in Interstate Commerce a Scheme of Agreed Guaranteed and/or Contract Rates Destructive of Competition in Violation of the National Transportation Policy and thus is Unjust, Unreasonable, and, per se, Unlawful under Section 1 of the Interstate Commerce Act.

In Great Lakes Shipowners Association v. Chicago & Northwestern Railroad Company, 337 I.C.C. 287, the railroad published a tariff on bituminous steam coal from Elm, Illinois to Sheboygan, Wisconsin, making a rate of $1.56 a ton available to shippers who guaranteed by bond that they would tender a minimum volume of 850,000 tons of coal per calendar year. The estimated annual volume of the power plant then being constructed by Wisconsin Power & Light Company at Sheboygan, Wisconsin was 1,000,000 tons per year. In holding the tariff invalid, Division 2 noted that while the annual volume is specific in amount, and is not stated in terms of percentages as in the Contract Rates and Guaranteed Rates cases, it has a similar effect. Where, said Division 2, a more or less predictable volume of traffic will move as here, it is simple to specify a minimum in terms of tonnages, which accomplishes the same purpose as a stated percentage. Thus Division 2 found the assailed rate item, i.e., the guaranteed annual minimum tonnage, constituted an unfair and destructive competitive practice contrary to the national transportation policy and hence was unjust and unreasonable and in violation of Section 1 of the Act.

The Great Lakes Shipowners case is indistinguishable from the case at bar. Indeed, the present case is an even stronger example of an unfair and destructive practive in violation of national transportation policy and Section 1 of the Act inasmuch as, as has been previously indicated, the shipper is agreeable to making a commitment to all-rail shipments which, obviously, the Soo Line Railroad Company and the Erie Lackawanna Railway Company sought as a condition to publication of the proposed rate.

This, then, raises the question, what is the ultimate test of an unfair and destructive competitive practice contrary to the national transportation policy?

Contract Rates, Rugs and Carpeting from Amsterdam, N.Y. (the Contract Rates case), supra, on appeal to a three judge federal district court, was affirmed in New York Central Railroad Company v. United States, 194 F. Supp. 947 and, on appeal to the United States Supreme Court, affirmed per curiam, 368 U.S. 349. The district court, in analyzing what constitutes an unjust and unreasonable competitive practice within the meaning of the national transportation policy, indicated that earlier statutes are to serve as a guide to the kinds of competitive practices that the Congress authorized the Interstate Commerce Commission, in the exercise of its informed judgment, to decline to countenance. Specifically, the district court referred to Section 5 (a) of the Federal Trade Commission Act of 1914 (15 U.S.C. §45 (a)), which declares unlawful unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, words intended to go beyond common law concepts. Section 3 of the Clayton Act (15 U.S.C. §14), makes it unlawful to fix a price on condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors where the effect may be to substantially lessen competition or tend to create a monopoly. Section 14 Third of the Shipping Act of 1916 (46 U.S.C. §812) declares it unlawful for a water carrier regulated thereby to retaliate against any shipper by refusing space or resorting to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment. These statutes then are indicative of the test to be applied in this case.

In International Salt Co. v. U.S., 332 U.S. 392, it was held to be violation per se of Section 1 of the Sherman Act and Section 3 of the Clayton Act for a corporation which owns patents on machines for utilization of salt products to require lessees of such machines to use only the corporation's unpatented products in them. The court stated that it is unreasonable per se to foreclose competitors from any substantial market and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop. Appellant contended that its contracts were not unreasonable because they provided that if any competitor offered salt of equal grade at a lower price, the lessee should be free to buy in the open market unless appellant would furnish salt at an equal price. The court rejected this argument because appellant has at all times a priority on the business at equal prices. A competitor would have to undercut appellant's price to have any hope of capturing the market, while appellant could hold the market by merely meeting competition.

The effect is the same here. The railroads cannot escape the implications of the Sherman and Clayton Acts by stressing that even excluding the traffic moving under the assailed tariff there exists a substantial volume of traffic for which Great Lakes vessel companies may compete. The fact remains that the amount of milling grain and grain products involved in the requirement of the subject tariff is not an insignificant or insubstantial amount of interstate commerce and even were Great Lakes vessel companies to offer a transportation service at equivalent rates they would be precluded from the business because of such requirement. There can be no doubt that the subject tariff would be a violation of the Sherman and Clayton Acts were those Acts applicable to services.

United States v. Columbia Steel Co., 334 U.S. 446, teaches that a restraint may be unreasonable either because it is illegal per se or it is accompanied with a specific intent to accomplish a forbidden result. Further the court stated that when a combination, through its actual operation, results in an unreasonable restraint, intent or purpose may be inferred. In this instance, the railroads may seek to avoid any implication of intent to engage in a destructive competitive practice by adjusting upward the predicted consumption of milling grain at the Martins Creek Plant. If this argument is accepted, however, it means that there can never be an unlawful restraint or a destructive competitive practice within the meaning of the national transportation policy in an expanding market.

Such an argument was specifically rejected in United States v. Linde Air Products Co., 83 F. Supp. 978. Involved were entire requirements contracts for the supply of welding rods in connection with which a special discount was granted. The principal defense of the defendant was that even though its prior activities may have been violative of the antitrust acts, the conditions which gave rise to the contracts no longer existed because of the shortness of supply under postwar conditions, which was expected to continue. The court rejected this argument on the grounds that the defendant was merely trying to discover an effectual means of preventing judgment of the court.

By analogy, in this case there can be no extinguishment of the rights of Great Lakes vessel companies to the opportunity to compete for traffic and the railroads here cannot foreclose those rights merely by imposing a total requirements contract in order to obtain a reduced rail rate. As in United States v. Linde Air Products Co., supra, the restraint attempted by the railroads in this case is accompanied by an intent to achieve a forbidden result. The fact that such attempt may or may not be successful is immaterial. Condemned in United States v. Linde Air Products Co., supra, were entire requirements contracts, not because they involved entire requirements, but because of the additional element of a price discount. The discount, used as it was in connection with the entire requirements contract, constituted a violation of Section 3 of the Clayton Act.

It makes no difference here that the requirement is less than the full requirements of the Martins Creek Plant. The test is whether such a requirement substantially lessens competition or tends to create a monopoly. Additionally, in effect, an affirmative promise has been exacted from the shipper not to use a competitive transportation service with respect to this particular movement of milling grain, even though the reduction in rate used in conjunction with such a requirement patently imposes such a condition.

The situation is not unlike that of tying arrangements held illegal per se under both Section 3 of the Clayton Act and Section 1 of the Sherman Act. Northern Pacific Ry. v. United States, 356 U.S. 1; Standard Oil Co. of California and Standard Stations v. United States, 337 U.S. 293. While the standards of illegality under the two statutes are not identical, the Supreme Court has come close to adopting that position. Fortner Enterprises, Inc. v. United States Steel Corporation, 394 U.S. 494. In so doing, the court rejected the need for proof of truly dominant power. The presence of any appreciable restraint on competition provides a sufficient reason for invalidating the arrangement. As previously indicated, to acquire any of this traffic Great Lakes vessel companies would have to substantially undercut the proposed rate.

In a similar vein are shipping conferences, where a shipper signs an exclusive patronage contract and pays less than the regular freight rates charged to all others. Such practices have been held unlawful per se under Section 14 of the Shipping Act of 1916. Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481. There is no doubt that, if the subject tariff involved all of shipper's Martins Creek requirements, it would be illegal per se. The present proposal comes close to that, but such an arrangement need not be a total requirements contract to be unlawful. It is sufficient if any appreciable restraint on competition is present.

As was observed in New York Central Railroad Company v. United States, supra, page 951:

> "* * * The effect of such a contract upon competition is quite different from that of mere reduction in charges. In the latter case a competitor who meets the reduction is in as good a position to compete as theretofore; here, even if he meets the contract tariff with a similar one, he has some initial handicap, and whichever competitor gets the traffic, the other is then in a poor position to compete. All this would be a valid consideration for the Commission if only competing railroads were involved; it is doubly so in view of Congress' direction in the National Transportation Policy 'to recognize and preserve the inherent advantages of each' mode of transportation."

In Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, the Supreme Court stated that it makes no difference that there was not a complete monopoly. The fact that an arrangement is tempered by the fear of competition and affects only a part of the price of a product certainly does not take the contract out of the annulling effect of the rule against monopolies. The court adopted the following statement of Judge Taft in the Sixth Circuit Court of Appeals, 85 F. 271, 291:

> "Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly."

In summary, under all the applicable tests, the subject tariff institutes in interstate commerce a scheme of agreed, guaranteed and/or contract rates destructive of competition in violation of the national transportation policy and thus is unjust, unreasonable and per se unlawful under Section 1 of the Interstate Commerce Act.

## CONCLUSION

It is fully anticipated that respondent railroads will rely upon Lake Carriers' Association et al. v. The New York Central Railroad Company, et al., 343 I.C.C. 491, as justification for not reducing rail rates on grain and grain products from Buffalo to the New York and Philadelphia areas. It is the firm contention of Protestant Association, however, that the failure of respondent railroads, particularly the Erie Lackawanna, to publish reduced rates on grain and grain products from Buffalo to the New York and Philadelphia areas is unlawful and that the publication of such reduced rates on grain and grain products is necessary and desirable in the public interest so that the economies of lake-rail transportation can be preserved. For this reason Protestant Association will appeal to a three judge federal district court the Commission's decision in Lake Carriers' Asso-

*ciation et al. v. The New York Central Railroad Company, et al.*, supra. Thus such case cannot be considered to be a precedent for sustaining the validity of the proposed Soo Line Freight Tariff 543-B, ICC 7837. The mere fact of the pendency of such an appeal dictates suspension and investigation into the lawfulness of the proposed rate.

Respectfully submitted,

LAKE CARRIERS' ASSOCIATION

By ______________________
Scott H. Elder
1411 Rockefeller Building
Cleveland, Ohio 44113

## Certificate of Service

I hereby certify that on this 18th day of October, 1973, I served copies of the foregoing Protest and Petition for Suspension and Investigation upon Mr. M. M. Beyer, Manager, Commerce & Tariffs, Soo Line Railroad, Soo Line Building, Minneapolis, Minnesota; Mr. M. F. Coffman, Vice President, Erie Lackawanna Railway Company, Midland Building, Cleveland, Ohio 44115; Mr. R. H. Smith, Vice President, Soo Line Railroad, Soo Line Building, Minneapolis, Minnesota 55440; and upon other persons known to be interested, by mailing the same, postage prepaid, in accordance with Rule 42 (d) of the Commission's General Rules of Practice.

______________________
Scott H. Elder

# MEMBER COMPANIES OF LAKE CARRIERS' ASSOCIATION

Bethlehem Steel Corporation
Great Lakes Steamship Division
2600 Terminal Tower
Cleveland, Ohio 44113

Boland & Cornelius, Inc., Managers
1008 Marine Trust Building
Buffalo, New York 14203

Cleveland-Cliffs Iron Company
1460 Union Commerce Building
Cleveland, Ohio 44115

Cleveland Tankers, Inc.
P. O. Box 6479
Cleveland, Ohio 44101

Erie Sand Steamship Company
Foot of Sassafras Street
Erie, Pennsylvania 16512

Fort Motor Company
Steel Division
3001 Miller Road
Dearborn, Michigan 49121

The Hanna Mining Company,
100 Erieview Plaza
Cleveland, Ohio 44114

Huron Cement Division
National Gypsum Company
Alpena, Michigan 49707

Inland Steel Company
30 West Monroe Street
Chicago, Illinois 60603

The Interlake Steamship Company
Division of Pickands Mather & Co.
2000 Union Commerce Building
Cleveland, Ohio 44115

International Harvester Co.
2701 East 106th Street
Chicago, Illinois 60617

Kinsman Marine Transit Co.
1548 Rockefeller Building
Cleveland, Ohio 44113

Medusa Cement Company
P. O. Box 5668
Cleveland, Ohio 44101

Oglebay Norton Company
1208 Hanna Building
Cleveland, Ohio 44115

United States Steel Corporation
Great Lakes Fleet
400 Missabe Building
Duluth, Minnesota 55802

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INTERSTATE COMMERCE COMMISSION RECEIVED
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ADMINISTRATIVE SERVICES
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SECRETARY
INTERSTATE COMMERCE COMMISSION
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COMES NOW THE KANSAS MISSOURI RIVER MILLS, A NON-PROFIT ASSOCIATION OF FLOUR MILLS LOCATED IN KANSAS AND MISSOURI AND PROTESTS AND REQUESTS SUSPENSION OF SOO LINE FREIGHT TARIFF 543-B, I C C 7837, EFFECTIVE NOVEMBER 1, 1973. SERIOUS DAMAGE WILL BE DONE TO THE MEMBERS OF THIS ASSOCIATION

IF SUCH TARIFF IS ALLOWED TO BECOME EFFECTIVE. THESE RATES WOULD NECESSARILY RESULT IN A RELOCATION OF AVAILABLE FLOUR MARKETS AND WOULD INEVITIABLY CAUSE THE CLOSING OF MILLS THAT HAPPENED TO BE LOCATEDAT INTERIOR POINTS IN THE WHEAT PRODUCING AREAS OF KANSAS AND MISSOURI. THIS PROTESTANT THEREFORE JOINS IN PETITION AND PROTEST FILED BY GENERAL MILLS INC., INTERNATIONAL MULTIFOODS CORP., THE PEAVEY COMPANY, THE PILLSBURY CO., ALL HEADQUARTERED IN MINNEAPOLIS, MINN., THE STANDARD MILLING CO., KANSAS CITY, MO., ADM MILLING CO., SHAWNEE MISSION, KANSAS, AND ROSS INDUSTRIES, INC., WICHITA, KANSAS, PROTESTING THE PROVISIONS OF THIS TARIFF.

FOR THE REASONS SET FORTH IN THE ABOVE MENTIONED PETITION THIS PROTESTANT RESPECTFULLY REQUESTS THE COMMISSION TO SUSPEND THIS TARIFF AND INVESTIGATE THE UNLAWFULNESS THEREOF.

COPIES OF THIS WIRE ARE BEING MAILED TODAY TO MR M M BEYER, MGR., COMMERCE AND TARIFFS, SOO LINE RAILROAD CO., MINNEAPOLIS, MINN., AND TO OTHER INTERESTED PARTIES.

DATED AT WICHITA, KANSAS, OCTOBER 23, 1973.

R. A. KUCHARO, JR.,
REGISTERED PRACTITIONER
EXECUTIVE SECRETARY
KANSAS MISSOURI RIVER MILLS
P O BOX 2696
WICHITA KANSAS 67201

BEST COPY AVAILABLE

I am sure you realize that Buffalo has been, at least up until recently, the largest flour milling center in the country and this is a most important part of the local economy. We can ill-afford to have this vital industry destroyed and I, therefore, strongly oppose the proposed tariff.

Very truly yours,

EDWARD V. REGAN
County Executive

EVR/PRT/bs

cc: Congressman Dulski
Edward Brick, Chamber of Commerce
David Mix, Attorney, N.F.T.A.
John R. Roberts, President, Grain Elevator Employees

RECEIVED

OCT 25 1973

Before The

INTERSTATE COMMERCE COMMISSION

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I & S DOCKET NO._____

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## PETITION OF GEORGE P. BAKER, RICHARD C. BOND, AND JERVIS LANGDON, JR., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR FOR INVESTIGATION AND SUSPENSION

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| | |
|---|---|
| EFFECTIVE DATE: | November 1, 1973 |
| TARIFF REFERENCE: | Soo Line Tariff 543-B, I.C.C. 7837 (in its entirety) |
| COMMODITY: | Wheat, In Bulk |
| TERRITORY: | From Duluth, Minneapolis, Minnesota Transfer, and St. Paul, Minnesota, and Superior, Wisconsin to Martins Creek, Pennsylvania |

ROBERT SZWAJKOS
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

October 23, 1973

Counsel for Trustees

Before The

INTERSTATE COMMERCE COMMISSION

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I & S DOCKET NO.______

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# PETITION OF GEORGE P. BAKER, RICHARD C. BOND, AND JERVIS LANGDON, JR., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR FOR INVESTIGATION AND SUSPENSION

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NOW COMES, George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees of the Property of Penn Central Transportation Company, Debtor (Penn Central), and respectfully petition this Commission to suspend and investigate a joint rate on wheat, in bulk, published by the Soo Line Railroad Co. (Soo) and the Erie Lackawanna Railroad, Debtor (EL), and in support of their petition, state as follows:

## PRELIMINARY STATEMENT

By tariff schedules published to become effective November 1, 1973, the Soo and EL propose to establish a new reduced rate on wheat, in bulk, from Minnesota and Wisconsin points to Martins Creek, Pennsylvania. Martins Creek is located in eastern Pennsylvania, approximately 70 airline miles due west of New York City.

Penn Central requests suspension of the proposed rate on the grounds that it violates Section 15a(2) of the Act and constitutes a destructive competitive practice contrary to the National Transportation Policy.

Under the proposed rates, Soo and EL would move unit trains of wheat, in bulk, from Minnesota and Wisconsin origins to Martins Creek at a rate of 72.25 cents per hundredweight (summer rate), and 88 cent per hundredweight (winter rate). This represents a very substantial reduction by any standard. For example, the EL presently participates in a two-year old unit train rate on bulk wheat of 97 cents per hundredweight (or 134 percent of the proposed summer and 100 percent of the winter rate) to Clifton, New Jersey, which is only some 55 miles east of Martins Creek. (See WTL Tariff No. 485, I.C.C. A-476). The net result of this reduction can only be detrimental to Penn Central and to EL.

Penn Central does not object to unit train rates, per se. When published in the proper circumstances and reflecting the several conditions upon which the Interstate Commerce Commission (Commission) has approved such rates in the past, they constitute an effective and lawful railroad tool.

The Commission has previously approved multiple volume or trainload rates when they were published to meet some form of carrier or market competition, i.e., it was an effort to maximize revenue to the extent practicable. Here, however, the proposed rate is not motivated by either carrier or market competition, and the net effect will be detrimental not only to Penn Central, but to EL itself.

## ARGUMENT

### WHERE THE COMMISSION REVIEWS A VOLUME RATE TARIFF IT MUST CONSIDER THE EFFECT OF THE PROPOSED RATES ON THE MOVEMENT OF TRAFFIC BY THE CARRIERS CONCERNED, AND THE CARRIERS' NEED FOR REVENUES SUFFICIENT TO PROVIDE ADEQUATE AND EFFICIENT RAILWAY SERVICE.

In Coal to New York Harbor Area, 311 I.C.C. 355, 366, the Commission approved volume rates which were found necessary to meet the competition of residual oil at Eastern Seaboard utilities and to prevent substantial losses in existing railroad coal tonnages. Similarly, in Grain By Rent-A-Train, IFA Territory to Gulf Ports, 335 I.C.C. 111, 120, trainload rates were proposed "to enable the east-central Illinois area to compete in the corn export market. Such traffic at that time was not being handled by any carrier."

In following the requirements of Section 15a(2) of the Act and the National Transportation Policy, the Commission has always insisted on some showing that the carrier involved would either gain sufficient new business to overcome the effect of the reduced rates or would lose existing traffic and revenues therefrom if the volume rate were not improved. The consideration may properly be described as a maximization of profit under all the circumstances. Thus, even in I.C.C. v. New York, N.H. & H. R. Co., 372 U.S. 744, 759, the Supreme Court conditioned its approval of reduced rates with the requirement that they be "not detrimental to [one's] own revenue requirements."

As evident from facts of this case, the proposed trainload rate is not required by any existing competition, carrier or market. And as shall hereinafter be pointed out, the adverse result which will be experienced by both Penn Central and EL are catastrophic in magnitude.

EL and Penn Central serve Buffalo, New York, and participate in the substantial movement of flour emanating from the mills located there. Having lines reaching to Chicago, both Penn Central and EL enjoy substantial tonnages of grain moving to the east and to Buffalo in particular. The magnitude of the revenues involved is readily apparent from the figures taken from the annual reports of these carriers for the year 1972.

| Penn Central | | EL | |
|---|---|---|---|
| Tons | Revenue | Tons | Revenue |
| **WHEAT (STCC 01137)** | | | |
| 1,110,490 | $ 6,645,420 | 471,956 | $2,968,877 |
| **WHEAT FLOUR (STCC 20411)** | | | |
| 1,912,580 | $15,040,662 | 686,600 | $4,962,097 |
| **BRAN & MIDDLINGS (STCC 20412)** | | | |
| 422,523 | $ 1,939,744 | 136,473 | $ 541,954 |
| | $23,625,826 | | $8,446,728 |

One fact is certain. Existing wheat and flour traffic represents almost $24 million in revenues to Penn Central and over $8.4 million to EL annually. It necessarily follows that any adjustment which would substantially interfere with the present rate structure and the existing flow of traffic must be carefully scrutinized beforehand.

Penn Central does not suggest that all of the existing systemwide tonnages will be affected. It is emphasized, however, that the proposed rate will not move new business, and that other eastern lines will be forced to adopt revenue cutting measures to protect their share of the traffic. Traffic on the proposed unit train basis will only supplant existing traffict moving to points in the east and, in particular, the movement of wheat to Buffalo flour mills and the outbound flour as well.

Concentrating on the flour movement, Penn Central can reasonably demonstrate the effect of the proposed rates. The new rates would apply on the wheat supplied to a new flour mill at Martins Creek, with the flour movement beyond to points on the eastern seaboard by highway. This will effectively displace existing rail traffic to the same ultimate destinations from all origins - and particularly Buffalo. There is no question but that the movement from Buffalo to eastern seaboard points would either be lost entirely or the rates reduced to non-profitable levels. The consequences are ominous, to say the least.

To err, if at all, on the conservative side, Penn Central has considered that the combination of the unit train rates on grain to Martins Creek plus highway movement beyond would easily displace rail flour movement from Buffalo and other origins to all destinations within an eastern radius of approximately 125 airline miles from Martins Creek. This area would include the major destinations in Connecticut and all destinations in Delaware, New Jersey, southern New York, eastern Pennsylvania and eastern Maryland.

During the year of 1972, Penn Central handled 1,912,580 tons of flour. Based on a detail study of the first six months of 1971, a representative year, fifty percent of the total movement originated in Buffalo, and 24 percent originated in

Western Trunk Line territory wherein the eastern roads would apply proportional rates from Chicago to three principal centers, viz., Waterbury, Conn., New York, N. Y., and Philadelphia, Pa., as representative. These rates are:

FLOUR

| To | From Chicago 1/ | From Buffalo 2/ |
|---|---|---|
| Waterbury | 87¢ | 65¢ |
| New York City | 83¢ | 58¢ |
| Philadelphia | 81¢ | 58¢ |

1/ Chicago rates - TL-CTR-C/TN 245-I, I.C.C. C-375

2/ Buffalo rates - PC 702, I.C.C. 1140

These rates apply in both boxcar and covered hopper movement. Boxcar loading averages 55,000 pounds and covered hopper, 95,000 pounds. Again, to be conservative, Penn Central has used the Philadelphia rates to compute the average carload revenues. From Buffalo to the affected area, based on the detailed 1971 study, Penn Central handled flour in 4,520 boxcars and 1,279 hoppers, and from the balance of Trunk Line territory, there were 1,019 boxcars and 581 covered hoppers. Applying current rates at 55,000 pounds per boxcar and 95,000 pounds per covered hopper, the existing rates would provide gross revenues of $2,791,801 to Penn Central. Assuming that the first six months' figures represent 50 percent of the annual movement, the potential loss in gross revenue to Penn Central amounts to $5.58 million annually. These revenues will disappear rather quickly if the proposed rate takes effect and flour movement from the Buffalo area to this destination area becomes a thing of the past.

The balance of Penn Central's traffic to the affected area described above (4,341 carloads) comes from CTR territory and points west, primarily over Chicago. From Chicago to the affected area, the lowest present rate is that to Philadelphia, 81 cents per hundredweight. That rate is used here for a conservative estimate of the amounts involved. During the first six months of 1971, Penn Central handled 2,004 boxcars and 2,337 covered hoppers of flour from WTL and Central Territory to the affected area. At an average rate of 81 cents per hundredweight, and at 550 cents per hundred weight and 950 cents per hundredweight per boxcar and covered hopper car, the existing rates would provide $2,691,103 in gross revenues for Penn Central for the first half of 1971, or roughly $5,382,206 annually.

The sum total of Penn Central gross revenues on flour movements alone to the affected area comes to approximately $11 million annually, $5.58 million of which comes from Buffalo and other Trunk Line origins. Since EL serves the same principal origins and interchange points as does Penn Central, it may reasonably be assumed that the present gross revenues to EL on flour which are endangered thereby are approximately 33 percent of those experienced by Penn Central, viz., 33 percent of $11 million, or $3.63 million, of which approximately $1.78 million now accrues to EL on movements from Buffalo and other Trunk Line origins to the affected area. And this in turn amounts to 36 percent of EL's total gross revenues on flour for the year 1971.

The results are even more pointed in terms of net revenue. In Appendix A attached hereto, Penn Central has set forth the variable costs incurred by Penn Central in the movement of flour in boxcars (average loading, 55,000 pounds) and covered hoppers (average loading, 95,000 pounds) from Buffalo and Chicago to central destinations in the affected area, viz., Waterbury, Conn., New York City and Philadelphia. The costs shown are those developed by application of Rail Form A to PC's expenses for 1970, indexed to April 1, 1972. These would _prima facie_ reflect EL's general experience, and at the very least, provide a reasonable estimate of the forthcoming loss in terms of net revenue based on the 1971 study (cost and revenue calculations used). The appropriate revenue-cost comparisons are set forth below.

FROM BUFFALO (Per car)

| | BOXCAR1/ | | | COVERED HOPPER 2/ | | |
|---|---|---|---|---|---|---|
| To | Revenue | Variable Cost | Net | Revenue | Variable Cost | Net |
| Waterbury | $330.00 | $283.00 | $47.00 | $570.00 | $381.94 | $188.06 |
| New York City | 294.25 | 250.88 | 43.37 | 508.25 | 332.68 | 175.57 |
| Philadelphia | 294.25 | 254.38 | 39.87 | 508.25 | 338.38 | 169.87 |

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1/ At 55,000 pounds.

2/ At 95,000 pounds.

FROM CHICAGO (Per car)

| To | BOXCAR 1/ | | | COVERED HOPPER 2/ | | |
|---|---|---|---|---|---|---|
| | Revenue | Variable Cost | Net | Revenue | Variable Cost | Net |
| Waterbury | $440.00 | $366.00 | $74.00 | $760.00 | $548.96 | $211.04 |
| New York City | 420.74 | 333.88 | 86.86 | 726.75 | 499.70 | 227.05 |
| Philadelphia | 409.75 | 301.13 | 108.62 | 707.75 | 446.31 | 261.44 |

1/ At 55,000 pounds.

2/ At 95,000 pounds.

Following are Penn Central's actual movements of wheat flour (STCC 20-411-10): (1) From Buffalo to TL points, and (2) from Chicago, Central Territory and WTL by type of car for the first six months of 1971 and the net revenues accompanying these movements on the lowest net basis developed above ($39.87 per boxcar and $169.87 per covered hopper from Buffalo-TL, and $74.00 per boxcar and $221.04 per covered hopper from Chicago, CTR and west):

FROM

| | Net Revenue | |
|---|---|---|
| Buffalo and TL | | |
| 5539 BX @ $39.87 per car | $220,840 | |
| 1860 CH @ $169.87 per car | 315.963 | $536,803 |
| Chicago, CTR and West */ | | |
| 2,004 BX @ $74.00 per car | $148.296 | |
| 2,337 CH @ $221.04 per car | 516,570 | $664,866 |
| | | $1,201,669 |

BX - Boxcar

CH - Covered Hopper

*/ - Revenues and costs are for Penn Central only.

Again, this represents Penn Central traffic for the first six months of 1971. Assuming no seasonable variation, annual net revenues on flour would amount to $2.40 million, and since EL generally reflected 39 per cent of Penn Central results, EL stands to lose, either by elimination of present flour traffic or subsequent reductions in flour rates, as much as $936,000 in annual net revenues. Assuming conservatively that the effect would be limited to Buffalo and TL traffic to the affected area, EL stands to lose roughly $418,000 net revenue annually on its present flour traffic, based on the 1971 study.

## CONCLUSION

The proposed rate is not justifiable on the basis of existing or potential competition. Under all the circumstances, it is apparent that the proposed rate is not only discriminatory and unduly preferential of volume shippers, but will have a detrimental effect on the gross and net revenues of both Penn Central and EL. Any revenues gained as a result of the new rates will hardly offset, if at all, the adverse effect on existing grain and flour traffic. If allowed to become effective, the proposed rates will only serve to result in revenue losses for the rail carriers.

The proposed schedules should therefore be suspended.

Respectfully submitted,

Robert Szwajkos
ROBERT SZWAJKOS
Counsel for Trustees

## AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF PHILADELPHIA :

PAUL W. OLSON, being duly sworn, deposes and says; that he is Director-Market Planning and Research, for the Penn Central Transportation Company, Debtor; that he has read the foregoing Petition for Suspension and Investigation, and knows the contents thereof; that the same are true as stated, except as to matters and things if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

Paul W Olson
Paul W. Olson

Subscribed in my presence,
and sworn to before me,
by the affiant above named,
this 18th day of October, 1973.

Kathleen H. Monaco

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires July 14, 1975

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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# PROTEST AND PETITION FOR SUSPENSION AND INVESTIGATION

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| | |
|---|---|
| EFFECTIVE DATE: | November 1, 1973 |
| TARIFF REFERENCES: | Soo Line Freight Tariff 543-B, ICC 7837 |
| COMMODITY: | Wheat in bulk in covered hopper cars having capacity of 4,500 cubic feet and over. Minimum weight per movement 5,000 tons. Aggregate minimum weight 15,000 tons. |
| FROM: | Duluth, Minnesota; Minneapolis, Minnesota; Minnesota Transfer, Minnesota; St. Paul, Minnesota and Superior, Wisconsin. |
| TO: | Martins Creek, Pennsylvania |
| PROTESTANT: | The Kinsman Marine Transit Company<br>1548 Rockefeller Building<br>Cleveland, Ohio 44113 |

Robert J. Ables
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

Attorney for Protestant

Due Date: October 23, 1973

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## THE KINSMAN MARINE TRANSIT COMPANY, PROTESTANT

The Kinsman Marine Transit Company, protestant here, a Delaware corporation with offices at 1548 Rockefeller Building, Cleveland, Ohio, was founded in 1842. It has since then operated continuously on the Great Lakes. It presently operates 22 vessels in the domestic U. S. Great Lakes ore, grain, coal and stone trades. In 1971 and 1972 Kinsman operated between 13 and 16 vessels in the grain trade. Grain sales to total sales in this period was almost 40 percent. Grain movement, almost exclusively, was between Duluth/Superior and Buffalo.

The Commission suspended Soo Line Freight Tariff 543-A, ICC 7792, which was to be effective September 16, 1972, after protest by Kinsman and other protestants. In the words of the Commission in its Suspension Order of September 15, 1972, in Docket No. 8784, that tariff, if permitted to become effective, would:

-- "Be unjust and unreasonable;

-- in violation of the Interstate Commerce Act;

-- constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and

-- be unduly prejudicial and preferential in violation of the Interstate Commerce Act."

The Soo Line Railroad Company (Soo), the Erie Lackawanna Railway Company (Erie) and ConAgra Inc. (ConAgra) have tried to change the smell of the tariff which the Commission believed would be unlawful if put into effect. They have done this with minor changes in this year's proposal as compared with last year's proposal.

Last year, we protested the proposed predatory tariff because of the planned reduction from the single car rate on wheat of 108.5 cents per cwt to the proposed rate of 62.5 cents per cwt. This year, the Soo and Erie, with ConAgra, have upped the proposed rate 9.75 cents per cwt in the sailing season for a total of 72.25 cents per cwt and 25.5 cents per cwt during the winter for a total of 88 cents per cwt. Whereas the 1972 tariff called for 5 consecutive movements per shipment, 3 such movements are prescribed under the 1973 tariff. The annual minimum weight requirement of 100,000 tons in the 1972 tariff has (ostensibly) been eliminated in the proposal for 1973.

Like the proverbial rose, the smell is the same.

Kinsman carries grain from Duluth/Superior to Buffalo a distance of 992 miles with transfer costs at Buffalo, for 35 cents per cwt. Erie, holding a monoploy on rail service from Buffalo to Martins Creek, charges 58 cents per cwt for the single car rail rate from Buffalo to Martins Creek, a distance of about 300 miles for an overall water-rail rate of 93 cents per cwt. Since the Soo, Erie and ConAgra failed in their raid last year, Erie instituted a 5-car rate for grain from Buffalo to Martins Creek, which is now 40 cents per cwt. Thus, between Duluth/Superior and Martins Creek at present:

| SERVICE | RATE |
|---|---|
| Water only to Buffalo | 35 cents per cwt. |
| Water-rail (single car) | 93 cents per cwt. |
| Water-rail (5 car) | 75 cents per cwt. |
| All rail, through Chicago, (single rate) | 116 cents per cwt. |
| All rail, through Chicago, (through rate - summer) | 72.25 cents per cwt. |
| All rail, through Chicago, (through rate - winter) | 88 cents per cwt. |

In any case, the proposed summer tariff is lower than the cheapest water-rail route.

As for the winter rate of 88 cents per cwt, the only useful thing to be said is: see what happens when there is no competition.

Put another way, the Erie will subsidize the Soo. The Erie is now getting more than half (43 cents per cwt) of its revenue in this trade for a rail movement of about 300 miles. It will get 72.25 cents per cwt on the all rate route of 1383.8 miles - a distance four times the Buffalo/Martins Creek mileage - but must share this rate with the Soo.

The conspiracy of Soo, Erie and ConAgra against the Great Lakes carriers is apparent.

By holding up the grain rate on non-competitive rail transportation between Buffalo and Martins Creek, they can undercut existing low cost water service and ultimately lay the groundwork for eliminating established, satisfactory low, low cost water transportation of bulk grain products on the Great Lakes. Once this water competition is eliminated, or made ineffectual, it is clear that rail rates for the movement of grain from the north central states to eastern markets can jump dramatically.*

As it did not the last time, the Commission should not fiddle around with this important question. It should not permit experiments, and amended experiments, without fair examination of pertinent implications. Suspend the tariff so we all have time to see what gives here.

The question before the Commission is very largely the balance between different modes of transportation within our national transportation system. The Commission therefore should see through the long, fancy petitions, exhibits and rebuttals and cut through to the issue and see it for what it is.

Much the way ladies shoe stores are bunched together to make it easier for the lady to shop, so the milling companies who serve the eastern market have grouped together in Buffalo. They have consolidated milling facilities at this geographical point on the Great Lakes to take advantage of good transportation rates in moving grain products originating in our agricultural heartland. Nothing has changed in our economic, agriculture or political environment to challenge the rationale for relying on low cost Great Lakes water transportation service of grain products to Buffalo.

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* Despite tariff suggestions that future all rail rates will be based on cross lakes rates. The reasonable expectation is that lakes' rates will drop as water carriers feel the effect of rail competition. Since there is a point of no return, even for low cost water transportation, rail rates will control. When this happens rail rates will jump or the railroads go deeper in the hole. And - there will be no water transportation as an equalizer.

ConAgra, however, wishing to crack the eastern market and with no grain elevator worthy of its name in the East,[*] apparently found a good deal by acquiring "properties at both Martins Creek and Sandts Eddy which were formally cements plants".[**]

Having decided to change milling and transportation patterns in the important eastern flour market, ConAgra seduced the Soo and Erie to provide unit rate service for wheat with the enticing proposition that this was new business to be taken away from the only transportation carrier to be adversely affected by this conspiracy: the water carriers on the Great Lakes and Kinsman, which relies on the grain business for almost half of its revenues.

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[*] Exhibit 1, ConAgra Reply to Petitions for Suspension dated September 11, 1972.

[**] ConAgra Reply to Petitions for Suspension dated September 11, 1972, page 4.

Another thing that stokes our fires in this conspiracy of the railroads in setting up "alternative" transportation patterns is the frequent reference, in their various arguments to the Commission, that the Commission should not suspend the Soo and Erie tariff because Kinsman and the other water carriers on the Great Lakes are "unregulated" and therefore not deserving of protection by the Interstate Commerce Commission.

What brass.

It should be clear Kinsman has no complex about being an unregulated carrier in our national transportation system. We have operated on the Lakes in the bulk trades for 131 years on the basis of agreed rates with shippers, based largely on the law of supply and demand. And we are proud of the fact that we provide good service, at a profit, without having to fight our way through a regulatory mess to do it.

By what convoluted reasoning could the conspiracy hope to persuade the Commission it does not have a duty to preserve intact an important complement of our national transportation system, which has been long recognized and accepted by the shipping public not only as low cost, but good service? Why should the railroads be subsidized by driving out satisfactory competitive transportation service? Why should ConAgra which has made its business decision to set up a shoe store on the other side of town have special privileges?

We do not think ConAgra's ideas, supported by its greedy railroad friends, have merit in the economics of transportation and certainly have no merit under our National Transportation Policy.

## THE NATIONAL TRANSPORTATION POLICY

First, to give effect to the legal niceties of petitions to the Interstate Commerce Commission, and replies to petitions, and petitions for reconsideration and invalid replies to replies,* which railroad interests so dearly love in their practice before the ICC, Kinsman, as a member of the Lake Carriers Association, another protestant here, associates itself with the arguments of the Lake Carriers Association in this proceeding, particularly that:

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*next page

-- The proposed rate discriminates against water carriage in violation of Section 1(5), 2, and 3(4) of the Act.

-- The proposed tariff fails to recognize the inherent advantage in cost and service which is characteristic of Great Lakes water transportation and the Commission has no discretionary power to approve any type of rate which reduces the inherent advantage of water transportation in whole or in part.

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* Remember the hysterical telegram on September 28, 1972, by Soo and Erie, after all parties had had their time at bat with the Commission, in accordance with its rules of practice, whether or not to suspend the tariff. They advised that the "Purpose of this wire is not to influence Division 2's decision on the merits"; however, the telegram attempts to black jack the Commission into reconsidering its decision that the tariff would be unlawful on the basis that because of pending transportation and wheat acquisition problems, ConAgra must make a "final decision" to book space to meet mill wheat requirements at its Sandts Eddy facility "by Wednesday, October 4, 1972". And what was that "final decision"? It was to enter into a four-year agreement with the Ruan Leasing Company to provide private truck service from Oswego to its facility at Sandts Eddy. "Thus", said ConAgra, "if the proposed rate is suspended ConAgra will have to protect its Sandts Eddy investment by committing itself to water-truck movement for at least four years" and -- showing how much we can believe the conspiracy -- it

We think you should regard the considered and legal economic arguments of the Lake Carriers Association and of the other expected protestants in this proceeding, but as we said the last time, we hope you don't become lost in the nice arguments of counsel on precedent, some of which can be found for almost every view.

We do want you to understand that the designated railroads, enticed by the shipper, are raiding us by effectively cutting rates so much as to jeopardize continued service on the Great Lakes by Kinsman and other water carriers.

We do want you to understand that if these railroads are successful in this raid we almost certainly will be

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*Footnote continued.

concluded that if the then proposed rate was suspended "the ultimate disposition of the lawfulness of the proposed rate will become completely academic since ConAgra will no longer be in a position to use it". Actual facts:

1. ConAgra did not employ a water-truck movement.
2. ConAgra did not book space on water carriers to Oswego.
3. ConAgra did not use trucks from Oswego.
4. ConAgra did not use trucks.
5. ConAgra did employ water-rail movement.
6. Since ConAgra, the Soo and Erie are in again this year, with about the same tariff, the question of an all rail unit did not become "academic" when the Commission suspended the disputed tariff.

knocked out of the other Great Lakes trade because grain is one of our three major cargoes, constituting almost 40 percent of our sales, and we could not make enough money on the other cargoes to sustain us.

We want you to understand that a whole industry is in jeopardy here. The average age of the Great Lakes bulk carrier fleet in 1970 was 43.8 years, *Hearings 91st Congress, House of Representatives, Committee on Merchant Marine and Fisheries, Admiral Hirshfield, 544*. The average age of our fleet (the Kinsman fleet) was over 50 years. The President and the Congress in the Merchant Marine Act, 1970, P.L. 91-469, (which is the most significant legislation affecting shipping since 1936) decided to reverse this trend and revitalize the Great Lakes fleet. Specifically, the President and the Congress agreed:

-- "to permit, for the first time in history, operators of the Lake Carrier fleet to enjoy the same privileges with respect to tax deferrals and Government-aided ship construction that have been available to ocean carriers for over 30 years";

-- that the new law "will officially recognize the Great Lakes as the fourth seacoast";

-- that to meet competition Great Lakes operators "will be eligible to receive long-needed Government support";

-- that "to achieve a more productive, more modern and more profitable Great Lakes fleet" the Maritime Administration planned to undertake research projects "aimed at determining the adverse effect on Great Lakes shipping from existing railroad rate structures". (_Senate Report No. 91-1080, at 128 and 129, to accompany H.R. 15424, to amend the Merchant Marine Act, 1936_).

We want you to understand, therefore, that in 1970 the Congress made a major policy decision that Great Lakes shipping not only was to be preserved, but was to be helped, very substantially, as it had never been helped before.

We want you to understand that Kinsman, along with other Great Lakes operators, is doing its part to revitalize the fleet. Taking advantage of new tax benefits, we have a Capital Construction Fund Agreement with the Government for new shipbuilding. We have under construction four new dry bulk carriers, at a cost approaching $75 million. For us, this is a lot of money. We have hopes for further new ship construction.

We want you to understand, in conclusion that:

a) Congress has decided it wants a Great Lakes fleet for commerce (and defense).

b) Congress has enacted very substantial new law to upgrade the Great Lakes fleet.

c) Ship operators, like Kinsman, are responding to national transportation policy.

d) Congress' concern about railroad rate structures indicates it did not want action by railroads on rates which would pull the rug out from under Great Lakes vessel operators while they were rebuilding their fleet.

e) The proposed Soo and Erie rate threatens Kinsman's existence.

f) The Interstate Commerce Commission has before it a high transportation policy question involving the fate not only of one shipping company but, quite probably, the whole Great Lakes fleet.

We would also remind you that when the Congress and the President decided not only to sustain the Great Lakes fleet but to revitalize it they added the very important instruction to the Maritime Administration to watch the railroads.

Certainly the Congress did not intend further harassment of the Great Lakes fleet by existing railroads. But, consider what the research group, which was commissioned by the Maritime Administration to begin these studies, pursuant to Congressional instructions, found on the question of proceedings before the ICC adjudicating or enforcing resolution of dispute in rail/water competition:

> "Vague terms exist in the ICC Act and the National Transportation Policy, without any specific reference to the Great Lakes apart from inland waterways, thus appearing to deny its status, which has now been made official, in foreign trade, by the Maritime Act of 1970. This makes both regulation and enforcement difficult."

and, with respect to railroads overwhelming water carriers in legal proceedings before the ICC:

> "Procedural steps in adjudication of modal disputes tend to favor the more highly structured and capitalized rail carriers. Their permanent legal staffs are more capable of withstanding the extreme time and monetary expenses associated with adjudication within the ICC".

and, with respect to remedies if water carrier should win:

> "It is all the more frustrating to fight a lengthy case through the ICC...which tends to be a hollow victory because the traffic opportunity may be gone, much money has been expended and the precedent will not be used by the ICC to avoid another similar situation." (Relationship Inland Transportation Economics to Great Lakes Volume, U. S. Department of Commerce, Maritime Administration, Contract No. 1-35492, October, 1971, at p. S-4.)

The ICC should hear. It should also listen. The Great Lakes fleet has established low cost, satisfactory transportation service for the movement of grain to milling plants in the east. Under the Merchant Marine Act 1970, by an almost unanimous vote, the Congress and the President decided that the ever changing balance in our national transportation system should now give due regard to the preservation, and upgrading, of the Great Lakes water carrier fleet and that railroad rate structures should not undermine the development and growth of that fleet.

That is the National Transportation Policy, evanescent as it is. The ICC must regard it in administering the Interstate Commerce Act.

The message is loud and clear: Do not let the railroads get away with cute and predatory practices which will undermine existing water carrier service on the Great Lakes and inhibit its growth. At least do not permit such result without a close and careful examination of the implications of the proposed raid by the designated railroads.

Suspend the tariff.

If need be, we can be more deliberate during the period of such suspension in showing the Commission the truth and merit of our contentions that the proposed tariff is predatory, not consistent with our National Transportation Policy and is therefore unlawful.

Dated at Washington, D.C. this 23rd day of October, 1973.

Respectfully submitted,

THE KINSMAN MARINE TRANSIT COMPANY

By____________________

Robert J. Ables
Federal Bar Building West
1819 H Street, N.W.
Washington, D.C. 20006

Due Date: October 23, 1973

Certificate of Service

I hereby certify that on this 23rd day of October, 1973, I served copies of the foregoing Protest and Petition for Suspension and Investigation upon Mr. M. M. Beyer, Manager, Commerce & Tariffs, Soo Line Railroad, Soo Line Building, Minneapolis, Minnesota; Mr. M. F. Coffman, Vice President, Erie Lackawanna Railway Company, Midland Building, Cleveland, Ohio 44115; Mr. Charles H. Clay, General Freight Tariff Manager, Soo Line Railroad, Soo Line Building, Minneapolis, Minnesota 55440; and upon other persons known to be interested, by mailing the same, postage prepaid, in accordance with Rule 42(c) of the Commission's General Rules of Practice.

____________________

Robert J. Ables

County of Erie

EDWARD V. REGAN
COUNTY EXECUTIVE

PHONE- 716-846-8525

OCT [illegible]
ADMINISTRATIVE SERVICES
MAIL BRANCH

October 17, 1973

The Interstate Commerce Commission
Office of the Secretary
Washington, D.C. 20423

59923

Re: The Soo Line Freight Tariff 543-B, I.C.C. 7837

Gentlemen:

I understand you are investigating a proposed tariff by the Soo and Erie Lackawanna Railroads covering the shipment of grain from the Duluth - Superior and/or Minneapolis - St. Paul area to Martins Creek, Pennsylvania. The County of Erie is opposed to this tariff because it discriminates against the port of Buffalo and as a result of this would divert grain, which normally flows through this area and is processed here, to another area.

It is my understanding that the rate is discriminatory in that there is a higher charge for the shipment of such grain out of Buffalo during the winter season when the lakes are frozen than during the navigation season, and also that no provision is made for unit train rates from Buffalo to eastern points such as are being proposed in this case for other cities. There are other discriminatory aspects which I believe will be called to your attention by organizations more qualified to do so than I am. I do feel, however, that to put such a tariff into effect is not only unfair but would have a disastrous effect on the milling industry in this area resulting in a substantial loss of jobs and all the hardships which this would entail.

ERIE COUNTY EDWARD A. RATH OFFICE BUILDING, 95 FRANKLIN STREET, BUFFALO, N. Y. 14202

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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Suspension Board No. _____

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# PROTEST AND PETITION FOR SUSPENSION AND INVESTIGATION

---

Effective Date: November 1, 1973
Protested Items: Soo Line Freight Tariff 543-B, ICC 7837, including Item Nos. 85, 115, 125, 130, 132, 140, 145.

---

General Mills, Inc.
9200 Wayzata Blvd.
Minneapolis, Minnesota 55440

International Multifoods Corporation
1200 Investors Building
Minneapolis, Minnesota 55402

Peavey Company
760 Grain Exchange
Minneapolis, Minnesota 55415

The Pillsbury Company
608 Second Avenue South
Minneapolis, Minnesota 55402

Standard Milling Company
1009 Central Street
Kansas City, Missouri 64105

ADM Milling Company
4550 West 109th Street
Shawnee Mission, Kansas 66211

Ross Industries, Inc.
715 East 13th Street
Wichita, Kansas 67201

Protestants

By: John F. Donelan
John H. Caldwell
John K. Maser III
Washington Building
Washington, D. C. 20005

Attorneys

Due Date:
October 23, 1973

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Copies of (1) letter dated October 12, 1973 from attorneys for Protestants to Honorable Robert L. Oswald, Secretary I.C.C.; (2) letter dated October 17, 1973 from Secretary Oswald to attorneys for Protestants; and (3) letter dated October 19, 1973 from attorneys for Protestants to Honorable George M. Stafford, Chairman, I.C.C.

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

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Suspension Board No. _____

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## PROTEST AND PETITION FOR SUSPENSION AND INVESTIGATION

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| | |
|---|---|
| Effective Date: | November 1, 1973 |
| Protested Items: | Soo Line Freight Tariff 543-B, ICC 7837, including Item Nos. 85, 115, 125, 130, 132, 140, 145. |

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Come now General Mills, Inc., International Multifoods Corporation, Peavey Company, The Pillsbury Company, Standard Milling Company, ADM Milling Company and Ross Industries, Inc. (hereafter referred to as protestants) and protest against and petition for suspension and investigation of the tariff and tariff items set forth above, with a scheduled effective date of November 1, 1973. As will be demonstrated hereinafter, the protested tariff provisions are *prima facie* unlawful in several fundamental respects.

### Background and History of Protested Rates

By Soo Line Freight Tariff 543-B, ICC 7837, issued September 28 to be effective November 1, 1973, the Soo Line Railroad Company (hereafter referred to as the Soo) and the Erie Lackawanna Railway Company (hereafter referred to as the Erie) have published joint and proportional unit train rates on wheat, in bulk, from Duluth, Minneapolis, Minnesota Transfer, and St. Paul, Minnesota, and Superior, Wisconsin, to Martins Creek, Pennsylvania. The rate is tailored to apply only to Martins Creek, a destination served by the Erie and the site of a flour mill activated by ConAgra, Inc. (hereafter referred to as ConAgra) as of approximately March 1, 1973. The new proposed rates are applicable only on wheat, in bulk, in covered hopper cars with the capacity of 4,500 cubic feet or more. The rates require that the consignee, ConAgra, receive a minimum weight per shipment of 15, 000 tons. Each shipment must consist of not less than [illegible], each subject to an aggregate minimum weight not less than 5,000 tons.

[illegible] levels of rates have been proposed, allegedly based upon the Great Lakes' navigation season. A rate from each of the named origins in Minnesota and Wisconsin is proposed at the level of 72.25¢ per cwt to be applicable from November 1, 1973 through December 14, 1973, and from April [illegible], 1974, terminating on September [illegible], 1974. A rate from all of the same origins at the level of 88¢ per cwt is proposed to be applicable for

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the 3 1/2 month period from December 15, 1973 through March 31, 1974. The minimum weight per car is 190,000 pounds, and the tariff schedule allows 24 hours free time for loading and 36 hours free time for unloading with respect to each entire consecutive movement.

The new rate arrangement is especially designed to assist ConAgra in its marketing efforts in the east. The tariff is a direct outgrowth of the prior unsuccessful efforts of these two railroad proponents to publish and make effective similar, unlawful unit train rates on wheat which were contained in Soo Line Freight Tariff 543-A, ICC 7792, issued August 8, to be effective September 16, 1972. This similar 1972 tariff proposal by the same railroads, on behalf of ConAgra, met with the vigorous protest by these protesting milling companies and approximately 24 other affected parties. The 1972 unit train tariff was made the subject of an order of suspension and investigation by Division 2, entered and served September 15, 1972, in Docket No. I&S 8784, Wheat, Annual Volume Rate, Minn. and Wisc. to Martins Creek, Pa. Petitions were filed by both railroads and ConAgra seeking vacation of Division 2's suspension order, buy by order entered October 4, served October 18, 1972, Division 2 acting as an appellate division, denied the petitions and affirmed its order of investigation and suspension.

Representatives of these protestants were advised by the Erie that the purpose of the new rate proposal is to improve its net earnings from handling existing volumes of wheat the Erie now transports from Buffalo to Martins Creek on behalf of ConAgra. The Erie advised that the new rates would be constructed to " . . . equal the present water-rail costs available to the shipper today." See Appendix A hereto. The alleged justification advanced before the Western Trunk Line Committee was to publish rates to ". . . reflect existing transportation alternatives that are available today to move wheat from the Twin Cities and Head of the Lakes to Martins Creek, Pa." See Appendix B hereto.

Prior to publication of the protested tariff, representatives of these protestants met with officials of the Soo and informally expressed basic objections to the proposed rates. While certain changes were made, as will be demonstrated in this protest, the basic elements of unlawfulness in the tariff provisions were neither removed nor cured.

The protested rates are a direct outgrowth of I&S Docket No. 8784. Following suspension of those rates, the Soo and the Erie withdrew the proposal in its entirety by Supplement 3 to Soo Line Freight Tariff 543-A, ICC 7792, effective November 17, 1972.

Even before issuing notice of cancellation of the suspended rates in I&S Docket No. 8784, the Erie independently announced on October 19, 1972 a new, reduced 5-car rate on wheat applicable from Buffalo to Martins Creek. The rate was originally published at the level of 37¢ per cwt and, through ex parte increases, is now 40¢ per cwt. 1/ The Buffalo five car rate became effective on November 24, 1972 and is being used extensively by ConAgra today.

## Identity and Interest of these Protestants

The protested tariff schedule contains rates specifically designed to apply exclusively to ConAgra's new

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1/ See Supplement 102 to Erie Freight Tariff 146, ICC 174, effective November 24, 1972.

flour mill at Martins Creek, Pennsylvania, in operation since approximately March of 1973. This mill markets flour from hard wheat moving under the Erie 5-car rate applicable between Buffalo and Martins Creek. ConAgra flour moves to important marketing areas in eastern New York, New Jersey, Delaware and eastern Pennsylvania, an area long served by protestants operating mills at Buffalo, such as General Mills, International Multifoods, Peavey, Pillsbury and Standard Milling. ADM Milling Company (ADM) and Ross Industries, Inc. (Ross) also actively participate in this eastern flour market. ADM, among others, operates two flour mills at Minneapolis, one at Red Wing, Minnesota and at Des Moines, Iowa and one at Lincoln, Nebraska. Ross Industries, Inc. operates flour mills at Wichita, Wellington and Newton, Kansas. Concerning the eastern market, Buffalo mills provide substantial revenue to the Erie, the Penn Central and the Lehigh Valley through rail flour traffic handled by these railroads from Buffalo. Each of these railroads is in critical financial condition, a fact well known to the Commission. These three railroads are in the process of reorganization under Section 77 of the Bankruptcy Act. Another railroad heavily dependent upon the flour traffic of these protestants from the Buffalo mills is the Buffalo Creek Railroad, jointly leased and operated by the Erie and the Lehigh at Buffalo. The financial plight of the Erie and the Lehigh Valley would be directly affected by loss of important flour traffic to the Buffalo Creek Railroad.

Protestants with milling facilities at Buffalo must continue to look to the Erie, the Penn Central, the Lehigh Valley, and the Buffalo Creek for dependable, reliable service in serving vital flour markets throughout the east. In turn, these railroads must look to the continued availability of important flour tonnage from Buffalo and from western gateways such as Chicago for absolutely essential revenues. All efforts must be made to avoid any further adverse financial impact on these carriers whose financial conditions is so precarious. Accordingly, the Commission should properly review the instant rate proposal with great care in terms of its potential for a disastrous impact on the rates and revenues of the Penn Central, the Erie, the Lehigh Valley and the Buffalo Creek.

The protested tariff provision will, if permitted to become effective, result in prima facie unlawfulness under Sections 1(5), 3(1), 4(1), 6(1) and 15a(2) of the Interstate Commerce Act and under the National Transportation Policy. The protested tariff schedule should be suspended and made the subject of full investigation by this Commission.

## I. THE PROTESTED RATE OF 72.25¢ PER CWT IS UNJUST AND UNREASONABLE, CONSTITUTES AN UNFAIR AND DESTRUCTIVE COMPETITIVE PRACTICE, AND RESULTS IN A NEEDLESS, UNLAWFUL, DISSIPATION OF THE ERIE'S REVENUES IN VIOLATION OF SECTION 1(5) AND 15a(2) OF THE INTERSTATE COMMERCE ACT AND IN CONTRAVENTION OF THE NATIONAL TRANSPORTATION POLICY.

The protested rate of 72.25¢ represents a net reduction of 45.75¢ per cwt in the existing single car rates via Chicago. For 8 1/2 months of the year the proponent railroads have suggested a drastic rate reduction favorable to ConAgra representing a decrease in the single car rates of 39%. But, even more significantly, the proposed reduction will seriously undermine the Erie's net revenues. As we will demonstrate hereafter, the Erie will be placed in direct competition with itself.

### A. Allegations In I.&S. No. 8784 By Respondents And ConAgra Have Been Contradicted By Subsequent Facts.

Last year's efforts by the Erie and the Soo to publish an unlawfully preferential and unjust and unreasonable unit train rate for ConAgra's exclusive benefit was thwarted by proper exercise of this

Commission's power of suspension and investigation. Almost simultaneously with their withdrawal of the suspended 1972 unit train rate, the Erie Lackawanna published a 5-car rate for the benefit of ConAgra from Buffalo to Martins Creek, effective November 24, 1972. 2/ Under its 5-car rate from Buffalo, the Erie is understood to have handled and to be handling at least 80% of ConAgra's wheat requirements. 3/ Under the new rate proposal, the Erie intends to shift the handling of wheat now being carried to Martins Creek from Buffalo, a distance approximately 300 short line rail miles, to handling from Chicago, a distance of over 900 short line rail miles. In effect, the Erie will be competing with itself for basically the same volume of tonnage. The Erie justification for the rate (see Appendices A & B) indicates that the new rate has allegedly been constructed to match the existing, alternative ". . . water-rail costs available to the shipper today." As will be shown later in detail, the 72.25¢ rate is unjust and unreasonable

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2/ The rate was originally published at the level of 38¢ per cwt, a 17¢ per cwt reduction over the then available single car rates to Martins Creek. Supplement 100 to Erie Lackawanna Tariff 146, ICC 174, effective Nov. 24, 1972. Through Ex Parte increases, the rate is now at the level of 40¢.

3/ This fact was confirmed by information provided one of protestant's representatives by Mr. Warren Barber, Assistant Vice President, Marketing and Pricing of the Erie on August 16, 1973. This approximate percentage has also been confirmed by protestants through independent sources.

and results in a totally needless dissipation in the Erie's revenues. It violates both the principle of rate making in Section 15a(2) and is a resulting destructive competitive practice violative of the National Transportation Policy.

Extremely pertinent to the new proposal was the position taken by the Erie, the Soo and ConAgra in support of the unit train rates suspended in I&S No. 8784. These identical railroad proponents and their supporting shipper, ConAgra, argued both vigorously and repeatedly to this Commission that if the 1972 unit train rates were suspended, wheat traffic moving to Martins Creek would be lost irretrievably and irrevocably to water-private truck movement. The basic thrust of the defense of the 1972 rates by both the railroads and ConAgra was that suspension would determine whether ConAgra would commit either to water-private truck or to rail exclusively. This, so ConAgra claimed, was necessitated by the need promptly to make a commitment to rail movement or water-private truck. The exclusive choice was, according to ConAgra, to be determined conclusively by the Suspension Board. ConAgra pointed out in its reply to protest:

> "If the rates here protested are not allowed to become effective, ConAgra will truck direct from Oswego, New York, to Sandts Eddy, thereby eliminating handling through the Martins Creek elevator facility. . . . If ConAgra is to transport wheat to its Sandts Eddy mill via water-truck transportation in time to begin processing early next year when its mill will be completed it will have to purchase trailers and commit itself to a four-year contract with Ruan Leasing Company for trucks within the immediate future. Thus, if the proposed rate is suspended ConAgra will have to protect its Sandts Eddy investment by commiting itself to water-truck movement for at least four years. That being the case, the ultimate disposition of the lawfulness of the proposed rate will become completely academic since ConAgra will no longer be in a position to use it." (ConAgra Reply to Petitions for Suspension, Suspension Docket No. 57287, pp. 5-6.)

Time and again, in attempting to support the 1972 unit train rates, the theme was struck that suspension would inevitably result in ConAgra's exclusive use of water-private truck transportation via Oswego to Sandts Eddy. (See ConAgra Reply to Petitions for Suspension, Suspension Docket No. 57287, pp. 8, 10-11, 13, 24, 25.)

Indeed, ConAgra adamantly maintained in that proceeding:

> "The only question to be resolved in this proceeding is whether the rail respondents will move this profitable and much needed traffic or whether, alternatively, it will be irrevocably lost to unregulated water-truck movement if ConAgra is forced to purchase trailers and make a long-term tractor leasing arrangement with Ruan Leasing Company." (*Ibid*. at 24)

The Erie and the Soo made the same contentions. In the railroads' Reply to Protest, they pointed out:

> " . . .selection of the transportation or mode or modes to be used will be decided *with finality* in favor of the exempt water-private truck operation if the Commission suspends the Duluth-Martins Creek unit train rate." (Respondents' Reply to Protest and Petitions for Suspension, Suspension Docket No. 57287, p. 2, emphasis in original)

The Soo and the Erie echoed ConAgra in arguing that the choice of transportation mode would be an exclusive one, either all-rail or water-private truck. According to the railroad respondents, ConAgra was about to enter a minimum four year lease agreement with Ruan Leasing Company, ". . . the material terms of which have already been negotiated by those parties." (*Ibid* at 15) The Erie and the Soo further urged:

> "If the proposed rate is suspended 100% of ConAgra's wheat requirements to Sandts Eddy will move by unregulated water carriers and by private trucks." (*Ibid* at 15)

The same arguments were advanced with even greater fervor in the petitions to vacate filed by ConAgra and the respondents in I&S Docket No. 8784. Contending that there was no other realistic alternative available, ConAgra argued that if the proposed rate was suspended, it would have no choice but to:

> ". . . *immediately* enter into a long term lease agreement for tractors, make a substantial investment in the purchase of trailers, and hire additional competent, experienced drivers with the assurance of continuous employment in order to be able to begin to transport wheat to Sandts Eddy by exempt water-truck movement. *This is a fact which is beyond serious dispute*. ConAgra has already made a multi-million dollar investment in its facility and fully intends to employ it economically. The only economically feasible alternative to the proposed rail rate is unregulated water-truck movement which requires a long term lease commitment and equipment investment which, once made, will preclude use of the proposed rate." (ConAgra Petition for Expedited Reconsideration, I&S No. 8784, p. 3; first emphasis in original; second emphasis added; see also pp. 4-6).

*The above assertions by ConAgra and the railroad respondents in I&S No. 8784 have simply never materialized.* The vaunted, exclusive use of water-private truck movement of ConAgra wheat via Oswego did not occur.

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Petitions for reconsideration of ConAgra, the Erie and the Soo were filed on September 19, 1972 and denied by Division 2, acting in an appellate capacity, on October 18, 1972. Effective November 17, 1972, the Erie and the Soo withdrew and cancelled the unit train rates suspended in I&S Docket No. 8784. However, prior to cancelling the unit train rates, the Erie took independent action in announcing in October, effective November 24, 1972, the multiple car rates from Buffalo to Martins Creek pursuant to which the Erie is now handling at least 80% of ConAgra's wheat movements. It was also this rate which the Erie and the Soo have used as a competitive factor in constructing the 72.25¢ rate here at issue.

Any proper evaluation of justifications now advanced by the Erie and the Soo and ConAgra for this new unit train rate proposal must take into account the wholly inaccurate predictions advanced by these parties in I&S Docket No. 8784.

### B. The Protested Tariff Provisions Would Result In Unwarranted And Unlawful Dissipation Of The Revenues Of The Erie Lackawanna.

The Erie has claimed that the protested rates are designed to "produce additional net income" and to "maximize its earnings" through handling "trainloads of wheat through our longhaul connections into Martins Creek" as opposed to handling "ConAgra wheat in any other manner". See Appendix A hereto. This improvement in the Erie's net income is purportedly based on new rates pegged by the Erie to existing water-rail costs for the preponderance of the year. The Erie already handles the water-rail traffic for which the 72.25¢ rate is proposed. Accordingly, we note at the outset that the Erie is seriously jeopardizing its financial condition by rate action which puts it in competition with itself.

Mr. Eugene Bilz, a highly qualified, nationally recognized Transportation Cost Consultant was retained by these protestants to determine the financial impact of these new rates. 4/ Mr. Bilz has made a detailed study of the Erie's revenues and costs from operations under the proposed rates compared to revenues and costs under the Erie's five-car rate from Buffalo, presently utilized by ConAgra. This analysis demonstrates that the new proposal must be

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4/ Mr. Bilz previously submitted a Verified Statement in I&S Docket No. 8784.

suspended because it involves needless, unlawful dissipation of revenues by the Erie.

Under the Erie's five car rate from Buffalo to Martins Creek, the Erie now enjoys a revenue contribution (excess of revenue over variable costs) of 23.8 cents on present movements it transports to Martins Creek. Under the protested 72.25¢ rate, at which the predominant amount if not all of ConAgra's wheat tonnage will move, the Erie stands to earn a contribution from 16.7 to 20.3 cents on proposed movements in railroad owned cars and 15.6 to 19.2 cents on proposed movements in shipper cars. The Erie will suffer a revenue diminution from 3.5 to 8.2 cents per cwt. at the protested rate of 72.25 cents compared to the present Buffalo rail rate. Based on known information as to Erie rail movements to Martins Creek and ConAgra's capacity at that mill, Mr. Bilz calculated annual diminution in contribution for the Erie as follows in Table No. 1.

Table No. 1
Annual Contribution To Erie

| | |
|---|---|
| Buffalo Five Car Rate: | $491,232 |
| Protested 72.25 Cent Rate With Use of Railroad-Owned Cars: | $344,688 - $418,992 |
| Protested 72.25 Cent Rate With Use Of Shipper Cars: | $321,984 - $396,288 |
| Diminution In Contribution: | $ 72,240*- $169,248** |

Source: Table 1, Sheet 1, Appendix B (Bilz Verified Statement.)

---

* Based on 65% Division.
** Based on 60% Division.

Annual use of the 72.25 cent protested rate will result in the Erie earning from $72,240 to $169,248 less than what it presently earns under its five car rate applicable from Buffalo to Martins Creek. A detailed statement of this serious diminution in Erie net revenue is set out in Table No. 2 below.

### TABLE 2

### COMPARISON OF THE RAIL REVENUE CONTRIBUTION EARNED BY THE ERIE-LACKAWANNA RAILWAY IN TRANSPORTING WHEAT TO MARTINS CREEK, PA. AT THE PRESENT RATE FROM BUFFALO AND AT THE PROPOSED UNIT TRAIN RATES.

| | | Movements at Present 5-Car Rate From Buffalo to Martins Creek | Movements at Proposed Unit Train Rate to Martins Creek, Pa. | | | |
|---|---|---|---|---|---|---|
| | | | In Soo Line Cars | | In Shipper Cars | |
| Line No. | ITEM (1) | (2) | 60% Division (3) | 65% Division (4) | 60% Division (5) | 65% Division (6) |
| 1 | Revenue Per Cwt. | 40.0¢ | 43.4¢ | 47.0¢ | 43.4¢ | 47.0¢ |
| 2 | Variable Cost Per Cwt. | 16.2 | 26.7 | 26.7 | 27.8 | 27.8 |
| 3 | Revenue Contribution Per Cwt. (L.1 – L.2) | 23.8 | 16.7 | 20.3 | 15.6 | 19.2 |
| | Annual Volume of Wheat to Martins Creek | | | | | |
| 4 | Total Cwt. 2/ | 2,580,000 | 2,580,000 | 2,580,000 | 2,580,000 | 2,580,000 |
| 5 | Cwt. Transported by Rail (L.4 X 80%) 3/ | 2,064,000 | 2,064,000 | 2,064,000 | 2,064,000 | 2,064,000 |
| 6 | Total Revenue Contribution (L.3 X L.5) | $ 491,232 | $ 344,688 | $ 418,992 | $ 321,984 | $ 396,288 |
| 7 | Reduction of Rev.Contrib.at Proposed Rates | xxx | 146,544 | 72,240 | 169,248 | 94,944 |

Source: Tables 2 and 3 hereto.

1/ Based on proposed through rate of 72.25¢ applicable during period from April 1 through December 14. Revenue per cwt. in columns (3) and (4) is computed on basis of estimated division of 60% and 65% to the Erie-Lackawanna.

2/ Rail respondents reply to protests in Suspension No. 57287 (I.&S. 8784) stated that annual grind of wheat at Martins Creek would be 129,000 tons based on a normal 6 day work week. (129,000 X 20 = 2,580,000 cwt.)

3/ See Statement for source.

Source: Appendix C, Table No. 1, Sheet 1 (Bilz Verified Statement)

Source: Table 1, Sheet 1, Appendix C (Bilz Verified Statement.)

This analysis of reduction in the net income of the Erie is conservative. It is based on a factor of 80 percent rail to Martins Creek. To the extent the Erie is handling a greater portion of ConAgra wheat, the reduction in contribution shown in Tables 1 and 2, supra, would be even greater. (See Appendix C, p. 6)

ConAgra can be expected to utilize the 72.25 cent rate to the fullest possible extent. The 88 cent rate, 15.75 cents higher, would be used on a minimal basis, if at all. (Appendix C, pp. 6-8) ConAgra has storage capacity at Martins Creek equivalent to approximately 58 percent of its annual wheat requirements.

Mr. Bilz' analysis takes into account the possibility of limited use of the higher 88 cent rate. Revenue contribution was determined based on 90 percent of the annual tonnage moving at the 72.25 cent rate and 10 percent moving at the 88 cent rate. A 10 percent factor gives ample recognition to any tonnage which might be moved at the 88 cent rate.

Under these circumstances, the annual contribution to the Erie would be from $51,187 to $149,846 less than the contribution earned under the present rates. This is shown in the following Table No. 3.

## TABLE 3

### COMPARISON OF THE RAIL REVENUE CONTRIBUTION EARNED BY THE ERIE-LACKAWANNA RAILWAY IN TRANSPORTING WHEAT TO MARTINS CREEK, PA. AT THE PRESENT RATE FROM BUFFALO AND AT THE PROPOSED UNIT TRAIN RATES.

| Line No. | ITEM | Unit Train Movements In Shipper Cars at Proposed Rates | | TOTAL | Unit Train Movements In R.R. Owned Cars Proposed Rates | | TOTAL |
|---|---|---|---|---|---|---|---|
| | | 72.25¢ | 88¢ | (Col.2+Col.3) | 72.25¢ | 88¢ | (Col.5+Col.6) |
| | (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| 1 | Cwt. Transported Annually By Rail 1/ | 1,857,600 | 206,400 | 2,064,000 | 1,857,600 | 206,400 | 2,064,000 |
| | Movements at Proposed Rates | | | | | | |
| | Erie-Lackawanna Division-60% | | | | | | |
| 2 | Revenue Per Cwt. | 43.4¢ | 52.8¢ | xxx | 43.4¢ | 52.8¢ | xxx |
| 3 | Variable Cost Per Cwt. | 26.7 | 26.7 | xxx | 27.8 | 27.8 | xxx |
| 4 | Revenue Contribution Per Cwt. | 16.7 | 26.1 | xxx | 15.6 | 25.0 | xxx |
| 5 | Annual Contribution (L.1 X L.4) | $ 310,219 | $ 53,870 | $ 364,089 | $ 289,786 | $ 51,600 | $ 341,386 |
| | Erie-Lackawanna Division-65¢ | | | | | | |
| 6 | Revenue Per Cwt. | 47.0 | 57.2 | xxx | 47.0 | 57.2 | xxx |
| 7 | Variable Cost Per Cwt. | 26.7 | 26.7 | xxx | 27.8 | 27.8 | xxx |
| 8 | Revenue Contribution Per Cwt. | 20.3 | 30.5 | xxx | 19.2 | 29.4 | xxx |
| 9 | Annual Contribution (L.1 X L.8) | $ 377,093 | $ 62,952 | $ 440,045 | $ 356,659 | $ 60,682 | $ 417,341 |
| | Movements at Present Rates | | | | | | |
| 10 | Revenue Per Cwt. | xxx | xxx | 40.0¢ | xxx | xxx | 40.0¢ |
| 11 | Variable Cost Per Cwt. | xxx | xxx | 16.2 | xxx | xxx | 16.2 |
| 12 | Revenue Contribution Per Cwt. | xxx | xxx | 23.8 | xxx | xxx | 23.8 |
| 13 | Annual Contribution (L.1 X L.12) | xxx | xxx | $ 491.232 | xxx | xxx | $ 491,232 |
| | Reduction of Rev. Contribution at Proposed Rates | | | | | | |
| 14 | Based on 60% Division (L.13 – L.5) | xxx | xxx | $ 127,143 | xxx | xxx | $ 149,846 |
| 15 | " " 65% " (L.13 – L.9) | xxx | xxx | 51,187 | xxx | xxx | 73,891 |

Source: Tables 2 and 3 hereto.

1/ Based on assumption that 90% of tonnage will move at the 72.25¢ rate applicable from April 1 to December 14 and 10% will move at the 88¢ rate applicable from December 15 to March 30.

Source: Appendix C, Table No. 1, Sheet (Bilz Verified Statement)

As seen from Table No. 3, supra, serious diminution in contribution to net revenue occurs for the Erie based on 90 percent use of the protested 72.25 cent rate and 10 percent use of the 88 cent rate.

Mr. Bilz' analysis is both conservative and realistic. Predominant use of the protested 72.25 cent rate will result in a substantial diminution in the Erie's net income. The Erie will be dissipating needed revenue by competing against itself for traffic it now handles under its five car rate from Buffalo to Martins Creek. Contrary to the Erie's alleged justification, the new rate proposal will, if effective, not improve or "maximize" the Erie's net earnings but will substantially reduce them. (See Appendix A)

Accordingly, in publishing the protested rates, allegedly based on alternative water-rail and all-rail movement, the Erie is unlawfully dissipating its revenues in violation of Sections 1(5) and 15a(2) of the Act.

The Commission has an affirmative duty to determine the effect of the proposed rates on the financially precarious Erie, which is at this moment enmeshed in bankruptcy. That affirmative regulatory duty extends to protecting shippers such as these protestants who rely upon the Erie for service.

The effect of the proposed rates on a carrier's financial condition is a matter which the Commission is obliged to weigh carefully under the principles of Sections 1(5) and 15a(2) of the Act. Gasoline From San Francisco Bay Points To Ogden, Utah, 198 I.C.C. 683, 697 (1934); Barton Auto Co. v. Ann Arbor R. Co., 234 I.C.C. 775, 787 (1939); All Freight to Pacific Coast, 238 I.C.C. 327, 332 (1940); Alden Coal Co. v. Central R. Co. of New Jersey, 256 I.C.C. 401, 419 (1943)

Moreover, in determining just and reasonable rates, consideration of the needs of the carrier for sufficient revenues to enable the carrier to provide adequate and efficient transportation service requires the Commission to weigh indirect as well as direct consequences of its findings. This includes an evaluation of the likely disruption of the present rate structure in the region involved. See North Carolina Corp. Comm. v. Akron, Co. & Y. Ry. Co, 213 I.C.C. 259, 284 (1935); New Automobiles in Interstate Commerce, 259 I.C.C. 475, 534 (1945).

In Tractors - T. L. & W. T. L. Territories To S. W. & W. T. L. Territories, 319 I.C.C. 758 (1963), Division 2 disapproved proposed Plan III TOFC rates on the ground that the proposal involved a serious threat of reduction in revenues produced by existing rates. Division 2 emphasized:

> "In considering what constitutes a reasonable minimum rate, one of the criteria referred to in New Automobiles in Interstate Commerce, supra page 534 [259 I.C.C. 475], was 'whether the carrier would be better off from a net-revenue standpoint with it than without it.'"
>
> * * *
>
> "The critical need of the railroads for revenue is so well known that it requires no discussion . . . the establishment of lower rates where there is no indication of a prospective net gain to the carriers results only in needless dissipation of revenues, and an accompanying unwarranted increase in the burden on other traffic . . ." (Ibid at 765)

In finally condemning the reduced rate proposal, the Division made findings which are particularly relevant herein. Division 2 concluded:

> "While the evidence presented is lacking in other respects, it shows clearly that the respondents are now obtaining the great bulk of the shipper's traffic from Detroit to the specified destinations, and that the volume moving, or likely to move, in private carriage, which is relied upon to justify the proposed rates, is insignificant. Considering the lack of evidence of competitive need, and the serious

> threat of reduction in the revenues produced by the existing rates, we conclude that the proposed rates are not shown to be just and reasonable." (Ibid at 766)

A reduction in a carrier proponent's net revenue is cause in itself for disapproval of a rate proposal under Sections 1(5) and 15a(2). See Phosphate Rock, Points in Florida to Virginia, 313 I.C.C. 495, 501 (1961).

Recently, in a strong initial decision in I&S Docket No. 8777, Freight All Kinds, Between Illinois & New Jersey, Administrative Law Judge R. J. Mittelbronn concluded that reduced rates on freight-all-kinds traffic, based on a fixed multi-trailer minimum, had not been shown to be just and reasonable because of the absence of a fundamental ". . . showing that the carriers will be better off net revenue-wise." I&S Docket No. 8777, Freight All Kinds, Between Illinois & New Jersey, Initial Decision, Administrative Law Judge R. J. Mittelbronn, served August 27, 1973, Sheet 17. Judge Mittelbronn concluded that the railroad proponents had failed utterly to sustain their statutory burden of proof in the absence of probative, substantial evidence that the reduced rates would improve the carriers' financial condition. One carrier proponent had argued that such matters were for carriers' "managerial discretion".

In language highly appropriate herein, Judge Mittelbronn pointed out:

> "Such argument, without factual, probative, supporting evidence, must be rejected. For too long the Commission has relied on the managerial discretion of the eastern carriers in matters of this nature, and the result has been railroad financial deterioration to the point of discontinuing rail service to major segments of the nation in the eastern half of the country." (Ibid at Sheet 18)

This Commission can be expected to be keenly sensitive to any rate action by the Erie which further endangers its already precarious financial condition. In that connection, protestants here will send, as they did in I&S Docket No. 8784, a copy of this Protest and Petition for Suspension and Investigation to Honorable Robert D. Krupansky, United States District Judge sitting in the U.S. District Court for the Northern District of Ohio, Eastern Division, at Cleveland. In the view of these protestants, Judge Krupansky, as presiding Judge in the Erie Lackawanna Bankruptcy case, should be informed of the highly adverse economic impact of the Erie's rate action here subject of protest.

It would certainly be no answer to the unlawfulness of this proposal to argue that new traffic will be generated for the Soo. The proposal must meet the test of lawfulness under the Interstate Commerce Act from the standpoint of both proposing railroads. Even more importantly, the financial conditions of the Soo and the Erie are notably dissimilar. During the 12 months ending June 30, 1973, the Erie Lackawanna reported a loss of $7.2 million in net railway operating income and no return on investment. The Soo Line, on the other hand, for the same period, reported net railway operating income of $15.1 million and a rate of return of 5.64 percent. The Commission clearly should not allow a rate proposal to become effective which results in subsidization by the bankrupt Erie of the prosperous Soo.

Furthermore, in the experience of these protestants, the Soo has encountered, and can be expected to continue to encounter, severe problems in meeting grain shippers' rail transportation needs. These problems became extremely acute during the summer of 1973 and resulted in the Soo's being unable to handle existing wheat traffic from country points to Duluth for movement beyond by water. The Soo's inabilities in this regard arose, in these protestants' experience, from equipment shortages as well as deficiencies in power and crews. If the Soo is unable to handle existing wheat traffic, it will be in no position to handle added traffic under the new, protested unit train rates. These protestants sought to obtain official records of shortages in Soo Line covered hoppers from August, 1972 to present. Such records are in the possession of the Commission's Staff. Our request for access to the records was denied on the alleged ground such information is confidential. See Appendix D hereto. 5/

### C. Use Of Outdated, Annually Incorrect Factors For Cross-Lake Charges And Buffalo Handling Charges Further Renders The Protested 72.25 Cent Rate A Destructive Competitive Practice Disruptive Of Existing Rates.

Further demonstration of the destructive competitive practice involved in the protested 72.25 cent rate is the built-in advantage afforded ConAgra as a result of the tariff's seasonal application. The

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5/ Protestants have pending an appeal to the Chairman on the denial of their request by the Secretary of the Commission. As of this writing, no official action has been taken on the appeal.

claimed basis of the 72.25 cent rate is to meet alternative water-rail transportation via Buffalo. However, each year ConAgra will have available a rail rate for the following year based on an outdated, unreliable water factor. As of September 15, 1974, (the present expiration date in the tariff) ConAgra will be afforded a new rate for the 1975 navigation season (April 1, 1975 - December 15, 1975) based on 1974 cross-lake charges. It is a fact, recognized by ConAgra in I&S No. 8784, that the cross-lake charges trend upward each year. 6 / The inevitable result is that the protested rail rate will be annually understated. This produces unfair advantage to ConAgra and flagrantly contradicts the purported justification for the new proposal - to meet the existing water-rail alternative. This practice exacerbates the destructive competitive impact of the protested rate in terms resultant pressure on the Penn Central and the Lehigh Valley to lower flour rates from Buffalo to the same eastern markets served by ConAgra from Martins Creek. 7 /

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6 / See Exhibit 5 to ConAgra Reply to Protests, I&S No. 8784.

7 / ConAgra markets its flour by private truck.

Protestants asked the proponent railroads to cure this aspect of unlawfulness by terminating the rate annually on April 15. The railroads refused to do so. Lake charges for the next season could be determined prior to April 15. Expiration as of April 15 would have permitted construction of a new rail rate based on realistic alternative water-rail charges applicable during the period of that rail rate.

Another factor in construction of the proposed 72.25 cent rate is an assumed transfer cost of 5 cents per cwt. at Buffalo in connection with the water-rail alternative. That charge could well increase annually, rendering the all-rail rate both obsolete and further understated.

As shown above, the protested rate proposal constitutes a needless, unlawful dissipation of the Erie's revenues, in violation of Sections 1(5) and 15a(2) of the Act. It also constitutes a destructive, predatory competitive practice violative of the National Transportation Policy. Such _prima facie_ unlawfulness requires suspension and investigation by this Commission.

## II. THE PROTESTED RATE OF 72.25¢ PER CWT AS APPLICABLE FROM THE TWIN CITIES OF MINNEAPOLIS-ST. PAUL CONSTITUTES A DESTRUCTIVE COMPETITIVE PRACTICE IN VIOLATION OF SECTION 15a(2) AND THE NATIONAL TRANSPORTATION POLICY IN THAT THE PURPORTED WATER-RAIL ALTERNATIVE TRANSPORTATION TO MARTINS CREEK IS NOT AVAILABLE FROM THESE ORIGINS AND THE ORIGIN HANDLING CHARGES ON GRAIN ARE APPROXIMATELY TWO TO THREE TIMES GREATER AT DULUTH-SUPERIOR THAN AT THESE ORIGINS.

The purported justification for the protested 72.25¢ rate is to meet existing water-rail transportation alternatives available to ConAgra. See Appendices A and B. This assumed justification presupposes that wheat can and/or does move freely from the proposed origins at the same costs via water-rail to Martins Creek. This assumption is totally fallacious. There simply is no realistic alternative water-rail movement from the Twin Cities, Minneapolis and/or St. Paul, to Martins Creek. In terms of the purported justification of the Soo and the Erie there is no basis for extending the proposed rates to the Twin Cities. Minneapolis and St. Paul are not Great Lakes ports and should have been excluded as origins, as these protestants stressed to the Soo and the Erie during preliminary negotiations. The concept of water economics has no application whatsoever from Minneapolis-St. Paul.

There is no water-rail (i.e. lake-rail) alternative from Minneapolis-St. Paul to Martins Creek. The only realistic benchmark must be predicated on all-rail service from Minneapolis-St. Paul to Martins Creek, regardless of the season of the year. By their own calculations the comparable all-rail benchmark is 88¢ per cwt.*

Moreover, handling costs to transfer grain are vastly dissimilar at Duluth as opposed to the Twin Cities. These protestants are actively involved on a daily basis in the purchasing and merchandising of grain at both Duluth and the Twin Cities. The handling charges for transfer of grain from elevator to rail cars at Minneapolis or St. Paul range from approximately 11.7 to 12.5¢ per cwt. Charges at Duluth-Superior for the same transfer service whether to rail car or lake vessel are two to three times as great, ranging from 25¢ to 42¢ per cwt. Even assuming, without conceding, there was any basis for extending a rate predicated on water-rail alternatives to Minneapolis-St. Paul, the protested 72.25¢ rate from the Twin Cities is substantially understated by its failure to take into account the higher Duluth-Superior handling costs.

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* 43¢ Minneapolis to Buffalo; 5¢ transfer; 40¢ Buffalo to Martins Creek.

Protestants with Buffalo mills are unfairly handicapped and unduly prejudiced by the protested rate since they must pay the higher Duluth-Superior handling costs during the lake navigation season when their Buffalo mills rely substantially on wheat moving via lake carriage from Duluth-Superior. ConAgra, however, will be unduly preferred since it can draw wheat under a substantially lower transportation cost via all rail from Minneapolis. Clearly, there is no basis for applying the protested 72.25¢ rate from Minneapolis. That the rate has been extended without any justification to Minneapolis-St. Paul is further proof that the Erie and the Soo are engaged in predatory, destructive rate practices injurious to other eastern railroads such as the Penn Central, the Lehigh Valley, the Buffalo Creek, as well as the Erie.

Extension of the protested 72.25¢ rate to Minneapolis as an origin also severely injures protestant ADM. ADM operates a flour mill at Minneapolis which competes traditionally in serving the affected Eastern market territory here involved. ADM's Minneapolis mill grinds the same type of wheat used by ConAgra at Martins Creek. ConAgra markets its flour by private truck to important eastern destinations such as New York and Philadelphia. ADM is seriously disadvantaged by the protested 72.25¢ rate which allows ConAgra to move wheat by rail from Minneapolis to Martins Creek as though the costs and conditions were the same there as at Duluth-Superior. As previously emphasized, origin costs and transportation conditions at these points are radically different. Availability of the 72.25¢ rate from Minneapolis would enable ConAgra to reach eastern markets at a substantial advantage in transportation costs.

The rail rate on flour from Minneapolis to New York City, for example, is $1.20 per cwt. Deduction of the protested rate of 72.25¢ per cwt and the 2¢ per cwt truck transfer cost from Martins Creek to the mill site leaves a difference of 45.75¢ per cwt., available for moving the flour from ConAgra's mill site to destination. ConAgra's cost for trucking the flour the distance of 86 miles from ConAgra's mill site to New York City is substantially less than the above 45.75¢ per cwt differential. Over and above this, of course, ADM would be confronted with the additional handicap of 16¢ per cwt covering transfer from rail car to truck and local truck delivery on shipments to the many bakeries, requiring or strongly preferring truck delivery. Under the protested rate ConAgra would be similarly advantaged in reaching other eastern markets such as Philadelphia (43.75¢ differential to truck 62 miles), Wilmington, Del. (43.75¢ differential to truck 89 miles) and Patterson, N.J. (45.73¢ differential to truck 66 miles). It is no answer to such advantages conferred under the specialized, protested rate to contend that some bakeries are located on rail sidings. Even rail served bakeries prefer truck delivery if available.

Clearly, no legitimate basis exists for extending the 72.25 cent rate to Minneapolis/St. Paul and to do so results in further violations of Section 15a(2) and the National Transportation Policy.

## III. THE PROTESTED TARIFF IS IN FUNDAMENTAL VIOLATION OF SECTION 3(1) OF THE INTERSTATE COMMERCE ACT BY SUBJECTING THESE PROTESTANTS AND THEIR TRAFFIC TO UNDUE AND UNREASONABLE PREJUDICE AND DISADVANTAGE WHILE ACCORDING UNDUE AND UNREASONABLE PREFERENCE AND ADVANTAGE TO CONAGRA AND ITS TRAFFIC AT MARTINS CREEK.

It is a truism of federal transportation law that it is not the prerogative of the railroads to determine which shippers shall supply particular markets. Put another way, the railroads do not have the right to ". . . fix limitations on commerce." See D. A. Stickell & Sons, Inc. v. Alton R. Co., 255 I.C.C. 333 at 337. One of the inevitable consequences flowing from disregard of the foregoing principle is violation of Section 3(1) of the Interstate Commerce Act and its prohibitions against undue and unreasonable preference or prejudice.

In Stanislaus County, California v. U.S., 193 F. Supp. 145, at 148 the court stated the matter in emphatic terms, as follows:

> ". . . It is a matter of right, not of grace by the railroads, that regions and shippers shall not be prejudiced or their competitors preferred. . ."

To the same effect see Citizens Gas & Coke Utility v. Chicago & N.W. Ry. Co., 314 I.C.C. 266, 274; Fargo Chamber of Commerce v. Akron, C.&Y. R. Co., 306 I.C.C. 407, 412. It is the position of these protestants that one of the most fundamental vices in the protested tariff is the fact that, if permitted to become effective, it would produce undue and unreasonable preference and prejudice contrary to Section 3(1) of the Act.

The substance of the matter, of course, is that ConAgra out of its flour mill at Martins Creek [Sandts Eddy] is aggressively competing in the important Eastern Market Territory with the flour millers located at Buffalo, at Minneapolis, and the mid-continent area of Kansas and Missouri. All of these flour millers, protestants herein, endeavoring to remain in the Eastern Market Territory, are dependent to a substantial degree upon the Erie Lackawanna, a major eastern railroad. This is true whether the Erie Lackawanna is functioning as a single line carrier or an essential connecting line. The destination of New York City and its environs is a typical case in point.

Utilizing the classical transportation standard, the flagrancy of the undue preference and prejudice being indulged in by the Erie Lackawanna is at once apparent.

In Appendix C hereto, Mr. Bilz has treated the matter of the division of the protested joint rate as between the

Erie Lackwanna and the Soo Line. That discussion need not be repeated here. The short line rail distance from Buffalo to Martins Creek approximates 350 short line rail miles. The comparable distance for the movement of wheat via the Erie Lackawanna from Chicago to Martins Creek approximates 900 short line rail miles. Under the presently applicable tariff the rate on wheat from Buffalo to Martins Creek is 40 cents per cwt. By way of shocking contrast, for the hauling of wheat under the protested rate from Chicago to Martins Creek the Erie Lackawanna would be receiving 43.4 or 47¢ per cwt.!* Such variations compared to the existing 40 cent rate are unconscionable, under the transportation standard, in the light of the fact that the rail distance from Chicago to Martins Creek is approximately three times the rail distance from Buffalo to Martins Creek. There is absolutely no warrant for such profligate and unlawful favoritism on the part of the Erie Lackawanna directed to the flour miller at Martins Creek. Such favoritism, however well intentioned and ill-advised the motivation may be, is directly contrary to the mandate against undue preference and prejudice under Section 3(1) of the Interstate Commerce Act.

This is all the more anomalous and unlawful when, as these protestants have earlier pointed out, in effect in dissipating its revenues in this manner, to the unlawful advantage of ConAgra, the Erie Lackawanna is competing against itself, since it is now moving at least 80% of the wheat to ConAgra from Buffalo via the Erie Lackawanna.

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* 43.4 cents at 60% division; 47 cents at 65% division. (See Appendix C, Table 1, Sheet 1)

There is a further irony which, if anything, makes the Section 3(1) unlawfulness even more pernicious. These protestants will not belabor the point that the Erie Lackawanna is in bankruptcy and, for that reason, ill-advised, arbitrary and harmful rate decisions on the part of the Erie Lackawanna must not be tolerated by this Commission, as the guardian of the public interest.

The Commission needs no proof that the Erie Lackawanna is a major line serving Official Territory. The flour millers of Buffalo, the flour millers of Minneapolis and the flour millers of Kansas and Missouri are dependent upon the Erie Lackawanna to reach important destinations in Official Territory. Here they are competing with ConAgra which has made no secret of the fact that it intends to move its flour to the Eastern Market Territory, in large measure, by over-the-road trucks. It is supremely ironical that the Erie Lackawanna is willing, so flagrantly and ill-advisedly, to subsidize a truck movement of flour to the east in competition with the Erie Lackawanna as well as other harassed eastern lines such as the Penn Central and the Lehigh Valley. The tariff proposal under protest descends to its nadir in according the protested drastically reduced rates to the origins of Minneapolis and St. Paul. The purported justification is to provide an all-rail alternative to the factors in the lake-rail movement via Buffalo. While we have treated the matter elsewhere in this Protest, suffice it to say that, in the absence of a cataclysmic change in geography, Minneapolis and St. Paul are not ports on the Great Lakes. The consequence is that the according of the drastically reduced rates to Minneapolis-St. Paul is utterly and totally beyond even the dubious theory of the proponents of the tariff. This circumstance further exarcerbates the undue and unreasonable prejudice and disadvantage which the protested tariff would cause the flour millers at Buffalo, Minneapolis, and in Kansas and Missouri.

We do not here wish to belabor the point, except to mention an important practical fact. It is to be borne in mind that with respect to bakeries insisting upon truck delivery, the rail shippers from Buffalo, Minneapolis, Missouri and Kansas would be confronted with the additional handicap and expense involved in transferring the end product of flour from rail car to truck for such final delivery when seeking to compete with ConAgra out of Martins Creek which would be moving the predominance of its flour to ultimate destination by truck.

In the light of the flagrant violations of Section 3(1) inherent in the protested tariff an order of suspension and investigation is imperative.

## IV. THE PROTESTED TARIFF SCHEDULE RESULTS IN FLAGRANT VIOLATIONS OF SECTION 4(1) OF THE ACT.

It is elemental that Fourth Section departures under a rate proposal such as here involved require special authorization from the Commission pursuant to Section 4(1) of the Act. No such request for Fourth Section relief has been requested or obtained. Numerous examples of Fourth Section departures occur under the protested rates.

Operators of grain facilities at Chicago, Illinois, for example, are capable of shipping the same trainload quantities of wheat and can comply with all other proposed tariff conditions attached to the protested 72.25¢ rate. The protested rate results in Fourth Section departures at Chicago via the Soo-Chicago-EL tariff route.

The flat rail rate applicable on wheat originating at Chicago and shipped to Martins Creek is 98¢ per cwt. This rate is published in TL-CTR Tariff 245-I, ICC C-375. The same tariff provides a reshipping (or proportional) rate of 81¢ per cwt.

The 81¢ reshipping rate applies on ex-rail wheat upon which a rate of not less than 17¢ is paid to Chicago. The 17¢ represents what is commonly referred to as the "pad" which must be observed as the minimum inbound rate to Chicago in order to clear the 98¢ flat rate published from Chicago. Item 520 of TL-CTR Tariff 245-I, ICC C-375 governs the application of the reshipping or proportional rates from Chicago. Item 520 is attached hereto as Appendix E. The purpose of Paragraph (b) therein is to require protection of the Chicago flat rate (98¢ in this case) as minimum on rail shipments passing through Chicago. The Chicago rate "pad" is a tariff requirement designed to satisfy the provisions of the Fourth Section. This consideration was completely ignored in the protested tariff publication.

To clear the 98¢ flat rate from Chicago under the protested tariff, one must go considerably beyond the proposed Minneapolis-St. Paul and Duluth-Superior tariff origins. As indicated in Item 140, Note 1 of the protested tariff, the 72.25¢ rate named from these tariff origins is strictly a proportional rate applicable only on traffic which has originated beyond by rail. The rate from the country wheat origins required to support the proportional prerequisite of the protested 72.25¢ rate must exceed 25.75¢ to Minneapolis-St. Paul and Duluth-Superior before the Chicago flat rate is cleared (98.0¢ less 72.25¢ = 25.75¢).

Three Soo Line points which carry a 25¢ gathering rate on wheat to the rate base points of Minneapolis or Duluth in Soo Line Tariff 87-0, ICC 7772 are shown below:

| TO: | Minneapolis, Minn. | (MILES) |
|---|---|---|
| FROM: | Dent, Minn. | 196.5 |
| | Wendell, Minn. | 170.9 |

| TO: | Duluth, Minn. | (MILES) |
|---|---|---|
| FROM: | Pinewood, Minn. | 191.9 |

The Soo Line mileages indicated from these origins are provided in Soo Line Tariff 250-H, ICC 7571.

A Soo Line map with the three 25¢ gathering rate origins encircled is attached hereto as Appendix F. The protested rates create Fourth Section departures on the Soo Line across the entire breadth of its lines extending from these three origins all the way to Chicago. In the case of Dent, Minn. via Minneapolis, for example, this amounts to 653.5 miles of uncleared line (196.5 miles to Minneapolis plus 457 miles beyond).

Thus the protested tariff would provide lower rates from the more distant Minnesota origins than applicable for the much shorter distance from Chicago to Martins Creek, in contravention of the long and short haul provisions of Section 4. As stated heretofore, grain operators at Chicago have the ability to comply with the shipping volume conditions attendant to the protested rate.

Further reference to the attached tariff provisions (Item 520, TL-CTR ICC C-375) governing the application of the reshipping or proportional rates from Chicago indicates that under paragraph (c) the reshipping rates are also applicable on water arrivals at Chicago. It is conceivable, therefore, that wheat shipped by boat from Duluth and Superior to Chicago could be reshipped to Martins Creek on the basis of the 81¢ reshipping rate applying on Ex-Lake shipments. In contrast, the protested tariff would provide a lower 72.25¢ rate all the way from Duluth and Superior via an all-rail route passing through Chicago.

Violations of Section 4(1) of the Act under the protested tariff schedule require suspension and investigation. No special relief has been granted by the Commission. Fourth Section relief is not granted where to do so would be antagonistic to other substantive provisions of the Act, including particularly Section 3(1). *Railroad Commission of Nevada* v. *Southern Pac. Co.*, 21 I.C.C. 329, 341 (1911); see also *Mechling Barge Lines* v. *United States*, 376 U.S. 375, 383-386 (1964). Other serious violations of the Act, including unlawful preference and prejudice, have been demonstrated in detail in this protest.

## V. THE PROTESTED TARIFF PROVISIONS INVOLVED FLAGRANT VIOLATIONS OF SECTION 6(1) OF THE ACT

The proponent railroads have an unequivocal duty to state their charges, and rules and regulations related thereto, with definiteness and certainty. Handling Carload Shipments In West, 246 I.C.C. 57, 69; Bracing Charges at North Atlantic Ports, 279 I.C.C. 623, 626. Ambiguous, unclear, and indefinite tariff schedules should be condemned by the Commission. See Menominee Bay Shore Lumber Co. v. C. & N. W. Ry., et al., 200 I.C.C. 699, 701. Continental Steel Corporation v. N.Y.C. and St. L. RR., 256 I.C.C. 167, 176. Indeed, the Commission has held that with respect to proportional rates, which are involved here, lack of clarity is in itself sufficient grounds to warrant disapproval. Proportional Grain Between Federal Barge Line Ports, 225 I.C.C. 62, 64. Moreover, the Commission's tariff regulations explicitly require that tariffs containing proportional rates ". . . must clearly and definitely show the application thereof." 49 C.F.R. §1300.5.

The protested tariff schedule is literally shot full of ambiguity, vagueness, inconsistency and contradiction. The blatant violations of Section 6(1) of the Act arising from the tariff schedule require in and of themselves suspension and investigation by this Commission.

One example of ambiguity and uncertainty is reflected in the treatment by the tariff schedule of "shipment" and "movement". A "shipment" is subject to an aggregate minimum weight of 15,000 tons and ". . . must consist of not less than three (3) consecutive movements." Each "movement" is subject to an aggregate minimum weight of 5,000 tons. (Item 130(B)) However, Item 132, Disability Rule, provides for interruption of "consecutive movements" as a result of disability days but further provides that if the disability rule is invoked, and a "shipment" is enroute that a diversion or change in billing instructions will be permitted ". . . to effect delivery. . ." Ambiguity and inconsistency are apparent in that, by the terms of the tariff, Item 130, a shipment is defined to constitute three (3) consecutive movements. It would not be possible, therefore, for a "shipment" to be enroute when a disibility occurred since three (3) consecutive movements would not and could not occur simultaneously. It would be impossible for all three consecutive movements to be enroute at the same time. The effect of the third paragraph of Item 132 is to permit delivery of movements not even in existence.

Item 130(D) contains yet another example of serious ambiguity. That item provides that if the tonnage required is not met, the proposed rates will be inapplicable on

" . . . shipments that have moved. . ." unless charges resulting from application of single car rates exceed the lowest charge that would have been collected if the tonnage requirement had been met." Under these circumstances, the deficit is to be billed at the applicable rate in ". . . this tariff. . ." A "shipment" must, by definition in the tariff, constitute a minimum of not less than three consecutive "movements". Item 130(D) leaves in an ambiguous status (1) the situation where only one or two of the required three consecutive movements have been made, and (2) the situation where less than the required minimum of 5,000 tons is tendered on any particular movement. The rates to be applied, if any, under these circumstances are not clearly defined in the tariff.

But this is not an end to the matter of inconsistency and contradictions set out in the protested tariff schedule. There are even further examples demonstrating patent violations of Sections 6(1) of the Act.

The rates subject of the tariff are proportional rates subject of WTL 331-Z, ICC A-4774. Being a proportional rate, permitting storage in transit, transit tonnage must be surrendered to the Western Weighing and Inspection Bureau. However, Item 130 provides for certification of "shipments" moving at the rates in the tariff by the Eastern Weighing and Inspection Bureau. The tariff, therefore, undercuts the applicable jurisdiction of the Western Weighing and Inspection Bureau at origin.

Where railroad cars are used, the same cars would have to be used in each consecutive movement. The tariff does not clearly indicate whether this constitutes assignment of such equipment, and whether or not written notice would have to be given by the consignor for assignment, as well as written notice to terminate assignment at the conclusion of the shipment. The tariff also does not indicate whether carrier assignment of equipment (e.g., 50 cars) would comply with ICC Service Order 1120 providing that no more cars may be used in unit train service than the carrier had in unit train service as of February 15, 1973.

The third paragraph of Item 132, already cited above as inherently inconsistent and contradictory, provides for diversion or reconsignment at a charge of $10.00 per car. Restrictions and conditions applicable to such diversion or reconsignment are not delineated. In this connection, we note that the closest ConAgra facility west of Martins Creek is located at Chicago. There is an ambiguity as to whether under Item 132 cars moving toward Martins Creek could be diverted to Chicago at a charge of $10.00 per car and nothing more.

In view of the foregoing ambiguities, inconsistencies, and contradictions, the protested tariff schedule flagrantly violates Section 6(1) of the Act. For this additional reason, the Commission should suspend and investigate the protested tariff schedule and put the railroads to the substantive burden of proof of its lawfulness.

## VI. CONCLUSION

The protested tariff schedule involves serious violations of the National Transportation Policy, and Sections 1(5), 3(1), 4(1), 6(1), and 15a(2) of the Interstate Commerce Act. Similar efforts by the Erie and the Soo to publish an unlawful unit train rate on behalf of ConAgra were properly suspended by this Commission in I&S Docket No. 8784 in 1972. These railroads have now proposed another unlawful tariff schedule which calls for the same action by the Commission. The Commission must act to avert the harmful and injurious economic consequences of this proposal upon northeastern railroads such as the Erie, the Penn Central and the Lehigh Valley. The Commission should act to protect the legitimate interests of these protestants who will be injured if the protested rates were to take effect. The Commission should issue an order suspension and investigation and the proponent railroads should be required to meet their affirmative and substantive burden of proof under Section 15(7) of the Act.

Dated at Washington, D.C. this 23rd day of October, 1973.

Respectfully submitted,

General Mills, Inc.
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The Pillsbury Company
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Standard Milling Company
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Protestants

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Attorneys

Due Date:
October 23, 1973

## Certificate of Service

We hereby certify that on this 23rd day of October, 1973, we served copies of the foregoing Protest and Petition for Suspension and Investigation upon M. M. Beyer, Manager, Commerce and Tariffs, Soo Line Railroad Company, Tariff Publishing Officer, upon Counsel for the Erie Lackawanna Railway Company and the Soo Line Railroad Company, upon Honorable Robert B. Krupansky, United States District Judge, United States District Court for the Northern District of Ohio, United States Courthouse, Cleveland, Ohio, and upon other persons known to be interested, by mailing copies of the same, postage prepaid, in accordance with the General Rules of Practice of the Interstate Commerce Commission.

JOHN F. DONELAN

JOHN H. CALDWELL

JOHN K. MASER III

# EXPLANATORY STATEMENT

## Development of Rail Costs For Present Movement of Wheat From Buffalo, New York to Martins Creek, Pa.

According to information received by protestant milling companies from the Erie-Lackawanna, wheat is presently moving in covered hopper cars from elevators at Buffalo, N. Y. to ConAgra elevators at Martins Creek. The rate currently applicable on five-car shipments is 40 cents per cwt. (Ex Parte 299 level).

Table 2, hereto, shows a comparison of the present five-car rate with the variable cost applicable to the Buffalo to Martins Creek movement. The unit costs in Table 2 are based on operations in Region II, Official Territory excluding New England, in 1970 and are derived from Statement 1C1-70 prepared by the Cost Finding Section of the I.C.C. The Erie-Lackawanna is one of the Class I railroads included in Region II. For the purpose of the study, the year 1970 costs are adjusted to reflect wage and price levels as of January 1, 1973. The cost increase used in this adjustment, 15.9 percent,* is computed in accordance with the procedure recommended by the Cost Finding Section of the I.C.C. in Statement No. 2-58.

Terminal costs developed in the study include territorial average unit costs for all items of expense except station clerical expense, which is adjusted to reflect economies associated with the five-car operation. Switching costs are not adjusted to give recognition to possible savings resulting from the switching of five-car multiples rather than single cars. The applicable tariff covering the present Buffalo-Martins Creek movement provides that five cars are to be shipped under one bill of lading on one day from one consignor at one location to one consignee at one location. Accordingly, station clerical expense is adjusted in the cost study in order to take these provisions into account. In making the adjustment, 50 percent of total station clerical expense is considered to be related to the five-car shipment and 50 percent is considered related to each of the cars in the shipment. Thus, the adjusted cost per carload includes one-half of the average cost per carload plus one-fifth of the remaining cost. This adjustment has the effect of reducing station clerical cost from $8.40 to $5.04 per carload.

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* Actual wages and material prices increased by considerably greater amounts, e.g. wages increased by 27.8%. The average of 15.9% is adjusted downward so as to be applicable to costs including cost of capital and car hire.

A net load of 2,000 cwt., or 200,000 lbs., is used in the cost study in converting carload expense to a hundredweight basis. This is in accordance with the applicable tariff which specifies a minimum weight of 200,000 pounds per car.

Line-haul costs developed in the study are based on average weight train costs. Such costs are a composite of way and through train costs and reflect an average train weight of 4,070 tons and an average of 2.74 locomotive units per train. A tare weight of 32 tons per car is employed for the covered hopper cars used in the operation between Buffalo and Martins Creek. The 200,000 pound minimum weight applicable to the operation necessitates the use of high-capacity 100-ton cars. The tare weight of such cars operated by the Erie is not available; however, available data concerning cars operated by other railroads in Official Territory indicate that the average tare weight of 100-ton covered hoppers having a capacity of 4,500 cubic feet or more is approximately 32 tons.

Car-mile expense included in the study is based on the Rail Form A average shown for Region II. Since the involved movement is direct via the Erie, interchange expenses are not included. Inter-intratrain switching expense is included in the costs on a car-mile basis. An allowance for empty return movement is included based on the average shown for covered hopper cars in Statement 1C1-70. The territorial average empty return shown in that statement for Region II is 108 percent. Loss and damage claim payment expense is included in the study on the basis of the average cost for grain shipments reported in Appendix A of Statement No. 1C1-70.

## Development of Rail Costs Incurred By The Erie-Lackawanna Railway In Handling Unit Train Shipments of Wheat to Martins Creek, Pa.

The costs developed in Table 3 are applicable to the service performed by the Erie in the transportation of unit train from the interchange with the Soo Line at Chicago to ConAgra's elevator at Martins Creek. As is the case with costs developed for present movements to Martins Creek, the unit train costs are also based on Region II costs (Official Territory excluding New England) shown in Statement No. 1C1-70 prepared by the Cost Finding Section of the I.C.C. Such costs, which are based on rail operations in the year 1970, are adjusted for the purpose of the study to reflect wage and price levels as of January 1, 1973. The adjustment of the costs is made in accordance with the procedures set forth in Statement No. 2-58 prepared by the Cost Finding Section of the I.C.C. The adjustment results in increasing the 1970 costs by 15.9 percent.

Since there have been no movements of unit trains to Martins Creek, the development of costs for the proposed service necessarily involves a projection of certain cost-related operating factors. Switching expense at Martins Creek is based on 29 percent of the territorial average switching expense at origin or destination. In arriving at this percentage, it is estimated that the service performed by the Erie in switching loads and empties to and from the elevator will require one engine shift of eight hours. On a 51 car unit train, the switching time would amount to 9.4 minutes per loaded car or 29 percent of the territorial average of 32.6 minutes. Switching costs developed on this basis are, in my opinion, conservatively stated. The tariff is silent in regard to work performed at destination; but, it is highly probable that operating practices, such as, use of yard crews, separation of the train in two or more cuts and service at the elevator could add to the Erie's cost.

For the purpose of the study, several cost factors derived from the rail carriers' pleadings in Suspension No. 57287 (I.& S. 8784) are employed. In that rate matter, the Erie showed that its haul between the interchange with the Soo Line at Chicago and Martins Creek amounted to 910 miles. The Erie also showed that 51 cars would be utilized in transporting 5,000 tons of wheat, or an average loading of 196,000 pounds per car. The Erie and Soo Line also stated that all of the cars used in the proposed unit train operation would be owned by the Soo Line. The instant proposal also provides that shipper-owned or leased cars may be employed as per Agent B. B. Maurer's Mileage Tariff 7-C, I.C.C. #-54. The mileage charge specified in the cited tariff for covered hopper cars is 13 cents per loaded mile.

As of July, 1973, the Soo Line owned 1,806 covered hopper cars (Type LO) which meet the specifications described in the involved tariff publication. These cars are capable of carrying 99 or 100 tons and have a capacity of either 4,650 or 4,750 cubic feet (Equipment Register, July 1973). The car hire charged by the Soo Line to other railroads for the use of these cars ranges from $5.17 a day and 2.85 cents per mile for cars in the $15,000 to $17,000 cost bracket to $6.27 per day and 3.15 cents per mile for new cars in the $19,000 to $21,000 cost bracket. The average car hire for all of the 1,806 Soo Line cars suitable for use in the Martins Creek unit train operation amounts to $5.91 per day and 3.05 cents per mile. These car hire costs are included in the unit costs developed in Table 3 for the Erie-Lackawanna's portion of the unit train movement. In this connection, the line haul costs are based on two days running time at the average per diem charge of $5.91 per car day. This cost is converted to a cost per car-mile based on the Erie's haul of 910 miles and is then added to the car hire mileage charge of 3.05 cents to arrive at the total car hire expense paid by the Erie.

Freight train car expense at Martins Creek is computed by applying the average per diem charge of $5.91 to detention time of 2.5 days. The detention time of 2.5 days reflects 1.5 days detention at the elevator, as per the tariff provision specifying allowable detention of 36 hours at the consignee, plus an additional day for placement of the load and pulling of the empty. The latter factor represents 50 percent of the territorial average of two days employed in Rail Form A.

Station clerical expense is adjusted in the manner previously described in connection with the development of costs for the present operation. In making the adjustment 50 percent of total station clerical expense is considered to be related to the 51 car shipment and 50 percent is considered related to each of the cars in the shipment. This adjustment has the effect of reducing station clerical costs at destination from $4.20 to $2.14 per carload.

An adjustment is made in the running cost per gross ton-mile in order to reflect the operating characteristics of the unit trains. With a shipment weight of 5,000 tons loaded in 51 cars, the gross trailing weight of the unit trains is 6,632 tons in the loaded direction and 1,632 tons in the empty direction, or an average of 4,132 tons for the round trip. This weight, together with an estimated average of three diesel locomotive units per train, is used in adjusting the gross ton-mile cost to reflect the operating characteristics of the proposed unit train operation. The tare weight employed in the cost study for covered hopper cars is 32 tons per car. The derivation of this figure has been explained previously in the discussion of costs for the present movement. The unit train costs also include an allowance for 100 percent empty return of the equipment. Although this percentage is slightly lower than the territorial average of 108 percent applicable to covered hopper cars, it is believed that the empty unit train will follow the same route as the loaded train.

A small allowance for the Erie's portion of interchange expense at Chicago is also included in the cost study. Switching costs are based on 29 percent of the territorial average; the same percentage used in adjusting switching costs at destination. Car expense is based on detention time of one-half day at the per diem rate of $5.91 per day.

An allowance for loss and damage claim expense is included based on 50 percent of the amount shown for grain in Statement No. 1C1-70.

## VERIFICATION

Maryland )

Montgomery County )

Eugene F. Bilz, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ Eugene F. Bilz
Eugene F. Bilz

Subscribed and sworn
to before me this 19th day of
October, 1973.

Notary Public Diane A. [illegible]
My Commission expires 7/1/74

Sheet 1 of 2

## TABLE 1

### COMPARISON OF THE RAIL REVENUE CONTRIBUTION EARNED BY THE ERIE-LACKAWANNA RAILWAY IN TRANSPORTING WHEAT TO MARTINS CREEK, PA. AT THE PRESENT RATE FROM BUFFALO AND AT THE PROPOSED UNIT TRAIN RATES.

| Line No. | ITEM | Movements at Present 5-Car Rate From Buffalo to Martins Creek | Movements at Proposed Unit Train Rate to Martins Creek, Pa. In Soo Line Cars 60% Division | In Soo Line Cars 65% Division | In Shipper Cars 60% Division | In Shipper Cars 65% Division |
|---|---|---|---|---|---|---|
| | (1) | (2) | (3) | (4) | (5) | (6) |
| 1 | Revenue Per Cwt. | 40.0¢ | 43.4¢ | 47.0¢ | 43.4¢ | 47.0¢ |
| 2 | Variable Cost Per Cwt. | 16.2 | 26.7 | 26.7 | 27.8 | 27.8 |
| 3 | Revenue Contribution Per Cwt. (L.1 – L.2) | 23.8 | 16.7 | 20.3 | 15.6 | 19.2 |
| | Annual Volume of Wheat to Martins Creek | | | | | |
| 4 | Total Cwt. 2/ | 2,580,000 | 2,580,000 | 2,580,000 | 2,580,000 | 2,580,000 |
| 5 | Cwt. Transported by Rail (L.4 X 80%) 3/ | 2,064,000 | 2,064,000 | 2,064,000 | 2,064,000 | 2,064,000 |
| 6 | Total Revenue Contribution (L.3 X L.5) | $ 491,232 | $ 344,688 | $ 418,992 | $ 321,984 | $ 396,288 |
| 7 | Reduction of Rev.Contrib.at Proposed Rates | xxx | 146,544 | 72,240 | 169,248 | 94,944 |

Source: Tables 2 and 3 hereto.

1/ Based on proposed through rate of 72.25¢ applicable during period from April 1 through December 14. Revenue per cwt. in columns (3) and (4) is computed on basis of estimated division of 60% and 65% to the Erie-Lackawanna.

2/ Rail respondents reply to protests in Suspension No. 57287 (I.&S. 3784) stated that annual grind of wheat at Martins Creek would be 129,000 tons based on a normal 6 day work week. (129,000 X 20 = 2,580,000 cwt.)

3/ See Statement for source.

## TABLE 1

Sheet 2 of 2

### COMPARISON OF THE RAIL REVENUE CONTRIBUTION EARNED BY THE ERIE-LACKAWANNA RAILWAY IN TRANSPORTING WHEAT TO MARTINS CREEK, PA. AT THE PRESENT RATE FROM BUFFALO AND AT THE PROPOSED UNIT TRAIN RATES.

| Line No. | ITEM | Unit Train Movements In Shipper Cars at Proposed Rates |  | TOTAL | Unit Train Movements In R.R. Owned Cars at Proposed Rates |  | TOTAL |
|---|---|---|---|---|---|---|---|
|  |  | 72.25¢ | 88¢ | (Col.2+Col.3) | 72.25¢ | 88¢ | (Col.5+Col |
|  | (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| 1 | Cwt. Transported Annually By Rail 1/ | 1,857,600 | 206,400 | 2,064,000 | 1,857,600 | 206,400 | 2,064,00 |
|  | **Movements at Proposed Rates** |  |  |  |  |  |  |
|  | **Erie-Lackawanna Division-60%** |  |  |  |  |  |  |
| 2 | Revenue Per Cwt. | 43.4¢ | 52.8¢ | xxx | 43.4¢ | 52.8¢ | xx |
| 3 | Variable Cost Per Cwt. | 26.7 | 26.7 | xxx | 27.8 | 27.8 | xx |
| 4 | Revenue Contribution Per Cwt. | 16.7 | 26.1 | xxx | 15.6 | 25.0 | xx |
| 5 | Annual Contribution (L.1 X L.4) | $ 310,219 | $ 53,870 | $ 364,089 | $ 289,786 | $ 51,600 | $ 341,38 |
|  | **Erie-Lackawanna Division-65¢** |  |  |  |  |  |  |
| 6 | Revenue Per Cwt. | 47.0 | 57.2 | xxx | 47.0 | 57.2 | xx |
| 7 | Variable Cost Per Cwt. | 26.7 | 26.7 | xxx | 27.8 | 27.8 | xx |
| 8 | Revenue Contribution Per Cwt. | 20.3 | 30.5 | xxx | 19.2 | 29.4 | xx |
| 9 | Annual Contribution (L.1 X L.8) | $ 377,093 | $ 62,952 | $ 440,045 | $ 356,659 | $ 60,682 | $ 417,34 |
|  | **Movements at Present Rates** |  |  |  |  |  |  |
| 10 | Revenue Per Cwt. | xxx | xxx | 40.0¢ | xxx | xxx | 40. |
| 11 | Variable Cost Per Cwt. | xxx | xxx | 16.2 | xxx | xxx | 16. |
| 12 | Revenue Contribution Per Cwt. | xxx | xxx | 23.8 | xxx | xxx | 23. |
| 13 | Annual Contribution (L.1 X L.12) | xxx | xxx | $ 491.232 | xxx | xxx | $ 491,23 |
|  | **Reduction of Rev. Contribution at Proposed Rates** |  |  |  |  |  |  |
| 14 | Based on 60% Division (L.13 – L.5) | xxx | xxx | $ 127,143 | xxx | xxx | $ 149,84 |
| 15 | " " 65% " (L.13 – L.9) | xxx | xxx | 51,187 | xxx | xxx | 73,89 |

Source: Tables 2 and 3 hereto.

1/ Based on assumption that 90% of tonnage will move at the 72.25¢ rate applicable from April 1 to December 14 and 10% will move at the 88¢ rate applicable from December 15 to March 30.

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Sheet 1 of 2

## TABLE 2

## COMPARISON OF PRESENT RATE WITH VARIABLE COST FOR MOVEMENT OF WHEAT IN COVERED HOPPER CARS VIA THE ERIE-LACKAWANNA RY. FROM BUFFALO, N.Y. TO MARTINS CREEK, PA.

| Line No. | I T E M (1) | Source (2) | Amount (3) |
|---|---|---|---|
| | Variable Costs 1/ | | |
| 1 | Terminal Cost Per Cwt. | Sheet 2, Line 9 | 5.7¢ |
| 2 | Loss & Damage Claim Exp. Per Cwt. | St.1C1-70, App. A | .3 |
| 3 | Line Haul Cost Per Cwt.-Mile | Sheet 2, Line 18 | .02958¢ |
| 4 | Miles of Haul | --- | 344 |
| 5 | Line Haul Cost Per Cwt. | L.3 X L.4 | 10.2¢ |
| 6 | Total Cost Per Cwt. | Lines 1,2 & 5 | 16.2 |
| 7 | Rate Per Cwt. (X-299 Level) | --- | 40.0 |
| 8 | Revenue Contribution Per Cwt. | L.7 – L.6 | 23.8 |

1/ Costs based on operations in Region II (Official Territory excluding New England) in 1970 with adjustment to reflect wage and price levels as of January 1, 1973.

Sheet 2 of 2

## TABLE 2

## COMPARISON OF PRESENT RATE WITH VARIABLE COST FOR MOVEMENT OF WHEAT IN COVERED HOPPER CARS VIA THE ERIE-LACKAWANNA RY. FROM BUFFALO, N.Y. TO MARTINS CREEK, PA.

| ITEM (1) | Source 1/ (2) | Region II - Official Terr. Excl. New England (3) |
|---|---|---|
| Variable Costs | | |
| Terminal (Origin Plus Dest.) | | |
| Switching Cost Per Carload | St.1C1-70, Table 10 | $ 55.08 |
| Freight Train Car Exp. Per Carload | " " , Table 11 | 33.78 |
| Station Clerical Cost Per Carload-Average | " " , Table 18 | 8.40 |
| " " " " " -Adjusted | 2/ | 5.04 |
| Special Services Exp. Per Carloadq | " " , Table 9 | 3.39 |
| Total Cost Per Carload | Lines 1,2,4 & 5 | 97.29 |
| Loss & Damage Clerical Cost Per Cwt. | St.1C1-70, Table 3 | .032¢ |
| Total Cost Per Cwt.-1970 Level | (L.6÷2000)+L.7 | 4.897 |
| " " " " -Adj.to Jan.1,1973 Level | L.8 X 1.159 4/ | 5.7¢ |
| Line Haul (Average Weight Trains) | | |
| Cost Per Gross Ton-Mile | St.1C1-70, Table 3 | .22680¢ |
| Tare Weight (Tons) | 2/ | 32.0 |
| Tare Weight Expense Per Car-Mile | L.10 X L.11 | 7.25760 |
| Cost Per Loaded or Empty Car-Mile | 3/ | 6.38165 |
| Ratio-Total to Loaded Car-Miles | St.1C1-70, Table 3 | 2.08 |
| Cost Per Loaded Car-Mile | (L.12+L.13) X L.14 | 28.36964 |
| Lading Expense Per Cwt.-Mile | L.10÷20 | .01134 |
| Total Cost Per Cwt.-Mile | (L.15÷2000)+L.16 | .02552 |
| Cost Per Cwt.-Mile Adj.to Jan.1,1973 Level | L.17 X 1.159 4/ | .02958 |

1/ References to Statement 1C1-70 are to the Rail Carload Cost Scales prepared by the Cost Finding Section of the I.C.C. based on rail operations in 1970.

2/ See statement for source.

3/ Cost excluding interchange expense from Rail Form A application underlying Statement 1C1-70 (Summary 1, Sheet 1, Line 16).

4/ Year 1970 costs are increased by 15.9% to reflect Jan. 1, 1973 wage and price levels. Computation of wage and price index is in accordance with procedure outlined by the Cost Finding Section of the I.C.C. in Statement No. 2-58.

## TABLE 3

## COMPARISON OF ERIE-LACKAWANNA RAILWAY'S PORTION OF PROPOSED RATE WITH VARIABLE COSTS APPLICABLE TO MOVEMENT OF WHEAT IN COVERED HOPPER CARS VIA ERIE-LACKAWANNA UNIT TRAIN SERVICE FROM INTERCHANGE WITH THE SOO LINE AT CHICAGO, ILL. TO MARTINS CREEK, PA.

| Line No. | ITEM (1) | Source (2) | Movement in Soo Line Cars (3) | Movement in Shipper Cars (4) |
|---|---|---|---|---|
| | Variable Costs | | | |
| 1 | Terminal Cost Per Cwt. | Sheet 2, Line 10 | 1.6¢ | 0.7¢ |
| 2 | Loss & Damage Claim Exp. Per Cwt. | St.1C1-70, App.A | .2 | .2 |
| 3 | Line Haul Cost Per Cwt.-Mile | Sheet 2, Line 19 | .02684¢ | .02938¢ |
| 4 | Miles of Haul | 1/ | 910 | 910 |
| 5 | Line Haul Cost Per Cwt. | L.3 X L.4 | 24.4¢ | 26.7 |
| 6 | Interchange Cost Per Cwt. | Sheet 3, Line 8 | .5 | .2 |
| 7 | Total Cost Per Cwt. | Lines 1,2,5 & 6 | 26.7 | 27.8 |
| 8 | Through Rate Per Cwt. | 2/ | 72.25¢ | 72.25¢ |
| | Erie-Lackawanna Division of Thru Rate | | | |
| 9 | 60% Basis | L.8 X .60 | 43.4 | 43.4 |
| 10 | 65% " | L.8 X .65 | 47.0 | 47.0 |
| | Revenue Contribution Per Cwt. | | | |
| 11 | Based on 60% Division | L.9 – L.7 | 16.7 | 15.6 |
| 12 | " " 65% " | L.10 – L.7 | 20.3 | 19.2 |

1/ From Erie-Lackawanna reply in Suspension No. 57287.

2/ Rate applicable during period from April 1 to December 14, from Soo Line Freight Tariff 543-B, I.C.C. 7837.

## TABLE 3

## COMPARISON OF ERIE-LACKAWANNA RAILWAY'S PORTION OF PROPOSED RATE WITH VARIABLE COSTS APPLICABLE TO MOVEMENT OF WHEAT IN COVERED HOPPER CARS VIA ERIE-LACKAWANNA UNIT TRAIN SERVICE FROM INTERCHANGE WITH THE SOO LINE AT CHICAGO, ILL. TO MARTINS CREEK, PA.

| Line No. | ITEM (1) | Source 1/ (2) | Region II Costs For Covered Hopper Cars | |
|---|---|---|---|---|
| | | | Soo Line Cars (3) | Shipper Cars (4) |
| | Variable Costs | | | |
| | Terminal (Origin or Dest.) | | | |
| 1 | Switching Cost Per Carload-Avg. | St.1C1-70,Table 10 | $ 27.54 | $ 27.54 |
| 2 | " " " " -Adj. | L.1 X .29 2/ | 7.99 | 7.99 |
| 3 | Freight Train Car Exp.Per Carload | 2/ | 14.78 | xxx |
| 4 | Stat.Cler.Cost Per Carload-Avg. | St.1C1-70,Tab.18÷2 | 4.20 | 4.20 |
| 5 | " " " " " -Adj. | 2/ | 2.14 | 2.14 |
| 6 | Special Services Exp.Per Carload | St.1C1-70,Tab.9÷2 | 1.70 | 1.70 |
| 7 | Total Cost Per Carload | Lines 2,3,5 & 6 | 26.61 | 11.83 |
| 8 | Loss & Damage Cler.Cost Per Cwt. | St.1C1-70,Table 3 | .032¢ | .032¢ |
| 9 | Total Cost Per Cwt.-1970 Level | (L.7÷1960)+L.8 | 1.4¢ | 0.6¢ |
| 10 | " " " " -Adj. to Jan.1,1973 Level | L.9 X 1.159 3/ | 1.6 | 0.7 |
| | Line Haul (Unit Trains) | | | |
| 11 | Cost Per Gross Ton-Mile | 4/ | .22197¢ | .22197¢ |
| 12 | Tare Weight (Tons) | 2/ | 32.0 | 32.0 |
| 13 | Tare Weight Exp. Per Car-Mile | L.11 X L.12 | 7.10304 | 7.10304 |
| 14 | Group II Running Exp.Per Car-Mile | 5/ | .36157 | .36157 |
| 15 | Cost Per Loaded or Empty Car-Mile | L.13+L.14 | 7.46461 | 7.46461 |
| 16 | Ratio-Total to Loaded Car-Miles | 2/ | 2.0 | 2.0 |
| 17 | Cost Per Loaded Car-Mile | L.15 X L.16 | 14.92922 | 14.92922 |
| 18 | Car-Hire Exp. Per Loaded Car-Mile | 6/ | 8.70000 | 13.00000 |
| 19 | Total Cost Per Loaded Car-Mile | L.17+L.18 | 23.62922 | 27.92922 |
| 20 | Lading Expense Per Cwt.-Mile | L.11÷20 | .01110 | .01110 |
| 21 | Total Cost Per Cwt.-Mile | (L.19÷1960)+L.20 | .02316 | .02535 |
| 22 | Cost Per Cwt.-Mile Adj. to Jan.1, 1973 Level | L.19 X 1.159 3/ | .02684 | .02938 |

Footnotes shown on Sheet 3.

## TABLE 3

## COMPARISON OF ERIE-LACKAWANNA RAILWAY'S PORTION OF PROPOSED RATE WITH VARIABLE COSTS APPLICABLE TO MOVEMENT OF WHEAT IN COVERED HOPPER CARS VIA ERIE-LACKAWANNA UNIT TRAIN SERVICE FROM INTERCHANGE WITH THE SOO LINE AT CHICAGO, ILL. TO MARTINS CREEK, PA.

| Line No. | ITEM (1) | Source 1/ (2) | Region II Costs For Covered Hopper Cars: Soo Line Cars (3) | Region II Costs For Covered Hopper Cars: Shipper Cars (4) |
|---|---|---|---|---|
| | Variable Costs | | | |
| | Interchange | | | |
| 1 | Switch.Exp.Per Loaded or Emp.car | St.1C1-70,Table 12 | $14.04 | $14.04 |
| 2 | Switch.Exp.Per L.or E. car-Adj. | L.1 X .29 | 4.07 | 4.07 |
| 3 | Freight Train Car Exp.Per L.or E. Car | 2/ | 2.96 | xxx |
| 4 | Total Cost Per L. or E. car | L.2+L.3 | 7.03 | 4.07 |
| 5 | Cost Per Loaded Car Incl. Empty | L.4 X 2 | 14.06 | 8.14 |
| 6 | Cost Per Loaded Car-One Railroad | L.5÷2 | 7.03 | 4.07 |
| 7 | Cost Per Cwt. | L.6÷1960 | .4¢ | .2¢ |
| 8 | Cost Per Cwt.Adj.to Jan.1, 1973 Level | L.7 X 1.159 3/ | .5 | .2 |

---

1/ References to Statement No. 1C1-70 are to Rail Carload Cost Scales prepared by the Cost Finding Section of the I.C.C. based on rail operations in 1970.

2/ See statement for source.

3/ Year 1970 costs are increased by 15.9% to reflect wage & price levels as of January 1, 1973.

4/ Cost is adjusted to reflect operation of unit trains of 4,132 tons (round trip train weight) with 3.0 diesel locomotive units at through train wage scale.

5/ From Rail Form A application underlying Statement No. 1C1-70.

6/ Soo Line car cost computed as follows:

| | | |
|---|---|---|
| a) | Per diem charge per mile ($5.91 X 2 ÷ 910) | 1.30¢ |
| b) | Mileage rate | 3.05¢ |
| c) | Total per loaded or empty mile (a + b) | 4.35 |
| d) | " " loaded mile (c X 2) | 8.70 |

Shipper car cost is mileage rate per Agent B. B. Maurer's Mileage Tariff 7-C, I.C.C. H-54.

APPENDIX A

**Erie Lackawanna** *Railway Company*

[illegible]

TRAFFIC AND DEVELOPMENT DEPARTMENT

M. F. COFFMAN
VICE PRESIDENT

MIDLAND BUILDING
CLEVELAND, OHIO 44115

File F-Rel-Peavey Co.

August 29, 1973

Mr. James R. Scoggin, Vice President
Peavey Company
860 Grain Exchange
Minneapolis, Minn. 55415

Dear Jim:

As Warren Barber has told some of the milling people recently, the Erie Lackawanna and the Soo Line have reopened the subject of trainload movements of wheat from Duluth to Martins Creek, Pa.

In our attempt to reorganize, we are re-examining every avenue of potential that can produce additional net income. We feel in this situation that to handle trainloads of wheat through our longhaul Chicago connections into Martins Creek produces a greater net to EL than handling ConAgra wheat in any other manner.

Our current proposal calls for a 50-car train which will move in three consecutive turns. The rate will apply for the movement of wheat only, and has been constructed to equal the present water-rail costs available to the shipper today. The proposed rate is 88¢ per cwt. for the period January 1 to March 31, and 71.25¢ per cwt. from April 1 to December 31. These rates were constructed by adding together the present water or rail rate from Duluth to Buffalo with the elevation cost at Buffalo and the current 5-car rate from Buffalo to Martins Creek. The separate factors are lake vessel charges of 15.75¢ per bushel, or 26.25¢ per cwt., which are available from April through December each year. For the other 3 months of the year, the Buffalo trainload rate of 43¢ per cwt. (Ex Parte 299 level) would be available. To each of these costs (26.25¢ and 43¢) we added 5¢ for Buffalo elevation and the EL 5-car rate from Buffalo to Martins Creek which will be 40¢ per cwt. at the Ex Parte 299 level. This produces 88¢ for January-March (43¢+5¢+40¢) and 71.25¢ for April-December (26.25¢+5¢+40¢).

We fully appreciate the competitive impact on other Milling interests created by the presence of another mill relatively close to the market place. Nevertheless, a mill is already in operation on the Erie Lackawanna and in order for EL to maximize its earnings from this operation we find it essential to provide a trainload rate to Martins Creek. We are attempting to do this by not giving any preference to the Martins Creek Mill but are just giving them a rate equal to alternative present costs.

I hope that the above explanation is sufficient for you to see that we are trying to be equitable and completely reasonable to all.

Sincerely,

Fred Coffman

M. F. Coffman

*The Friendly Service Route*

BEST COPY AVAILABLE

APPENDIX B

WESTERN TRUNK LINE COMMITTEE

222 So. Riverside Plaza
Chicago 60606

J. E. AHLSTROM, CHAIRMAN

Aug. 29, 1973

APPLICATION X-E-21-9418

The following subject has been docketed. Interested parties are invited to express to traffic officers of the carriers any views upon the changes proposed prior to Sept. 17, 1973 and furnish a copy to the Chairman. If public hearing is desired, requests must be made upon the chairman prior to that date.

Copies to Chairmen of Bureaus and Associations as indicated below (1) for consideration of their lines, (2) as information or (3) submitted jointly:

( ) S.F.A. (912) ( ) T.C.F.B. (925) List 2
2-(1) O.F.T.C.- (936) ( ) W.F.A.-(W) (836) 380
East. R.R.
( ) C.F.A.-(E) ( ) 275-RL-W-260
( ) I.F.A. (899) ( ) W.W.L. (921) 508-P- 21
1163-Blue

DOCKETED AT INSTANCE OF: Carrier

1. COMMODITY: Wheat

1-A. STCC NO: 01-137

2. MINIMUM WEIGHT: 190,000 pounds per car used, subject to an aggregate minimum weight of 5,000 tons per train.

3. FROM: Duluth, Minneapolis, Minnesota Transfer, St. Paul, Minnesota and Superior, Wisconsin.

4. TO: Martins Creek, Pennsylvania

5. RATES & TARIFF REFERENCE: Present Single Car

| | | |
|---|---|---|
| To Chicago, Illinois | 36¢ cwt. | (WTL 332-H) |
| Beyond | 79¢ cwt. | (TL/CTR 245-I) |
| | 115¢ cwt. | |

(Including Ex Parte 295-A)

Proposed
Seasonal proportional rates of 71.25¢ cwt. applicable annually from April 1 to December 31 and 88.0¢ cwt. applicable from January 1 to March 31. Publication to be made in new Carrier Tariff.

6. DISPOSITION OF PRESENT RATES: To remain in effect.

7. ROUTING: Soo Line-Chicago, Illinois-Erie Lackawanna

8. FOURTH SECTION: Standard trainload intermediate application.

9. DIVISIONS: Have been arranged.

10. DEMURRAGE: Cars handled under the provisions of this item are not subject to Agent B. B. Maurers Tariff 4-1, I.C.C. H-36 and the provisions of this item will apply in lieu thereof. Free time for loading and unloading and charges for detention after expiration of free time will be as follows:

1. Empty cars sufficient in number to cover the unit train will be actually placed or constructively placed at origin. Twenty-four (24) hours free time, exclusive of Saturdays or Sundays, will be permitted for loading of all cars in a unit train. Time to be computed from time the first car in the unit train is actually or constructively placed. In the event the entire unit train is not tendered to carrier for movement to destination within twenty-four (24) hours, exclusive of Saturdays or Sundays, after placement, actual or constructive, detention charges

in the amount of $475.00 for each twenty-four (24) hour period or fraction thereof subsequent to free time shall be assessed.

2. Thirty-six (36) hours free time, exclusive of Saturdays or Sundays, will be permitted for unloading the entire unit train at destination. Time to be computed from the first 7:00 AM after actual or constructive placement. In the event all empty cars are not tendered after unloading, to carrier at destination within thirty-six (36) hours, exclusive of Saturdays or Sundays, after actual or constructive placement, a detention charge of $9.50 per car will be assessed on all cars in the unit train for each 24 hour period or fraction thereof subsequent to free time.

3. "Actual placement" is made when cars are placed for loading or unloading. If such actual placement is prevented due to any cause attributable to consignor or consignee, the cars shall be "constructively placed" and free time will be computed at origin as provided in Paragraph 1 and at destination as provided in Paragraph 2, the same as if the cars had been actually placed.

11. ADDITIONAL RULES:

a) Normal terminal or transit services and privileges such as weighing, inspection, diversion or reconsignment will not apply.

b) Each train will be required to make three (3) consecutive trips.

c) Shipment shall be tendered on one bill of lading, on a single day, from one consignor at one location at origin, to a single consignee, at one location at destination where all cars must be completely unloaded.

d) Rates will apply on traffic which has been stored in transit as authorized in WTL Freight Tariff 331-Z, I.C.C. A-4774, at station from which rate is applied.

e) No switching charges other than reciprocal switching charges will be absorbed by the EL at Martins Creek, Pennsylvania. Such charges which are not absorbed will be in addition to the line haul rate.

f) Rates will apply only when unit train is comprised entirely of covered hopper cars.

12. PROPONENT'S STATEMENT OF REASONS FOR CHANGE:

The all rail rates proposed reflect existing transportation alternatives that are available today to move wheat from the Twin Cities and Head of the Lakes to Martins Creek, Pennsylvania.

## APPENDIX C

BEFORE THE

INTERSTATE COMMERCE COMMISSION

SUSPENSION BOARD NO. ________

## VERIFIED STATEMENT OF EUGENE F. BILZ

My name is Eugene F. Bilz. I am Vice President of the firm of Gilbert J. Parr Associates, Inc., Transportation Consultants, with offices at 5530 Wisconsin Avenue, Washington, D. C. 20015.

I was graduated in engineering from the Catholic University of America in 1949. For a period of five years following my graduation I worked as a construction engineer, performing duties in the fields of costs, accounting and pricing in addition to field supervision of construction work in progress.

Since August 1954, I have been associated with the firm of Gilbert J. Parr Associates, Transportation Consultants. During this period of over 19 years I have been engaged continuously in the transportation field and have analyzed and prepared many cost and economic studies dealing with rail, motor carrier and water carrier operations. These studies cover practically all areas of the United States and were prepared on behalf of railroads, motor carriers, domestic and off-shore water carriers, state and federal agencies, and many individual shippers or shipper associations. I have appeared before the Interstate Commerce Commission and various state regulatory commissions as a witness in many proceedings to testify with respect to transportation cost and economic studies.

BEST COPY AVAILABLE

My statement herein is submitted on behalf of seven grain milling companies. These companies are: ADM Milling Company; General Mills, Inc.; International Multifoods Corp.; Peavey Co.; The Pillsbury Co.; Ross Industries, Inc. and Standard Milling Co. At the request of these companies I have reviewed and analyzed available data concerning: (1) The proposed movement of wheat in rail unit train service from Duluth and Minneapolis, Minn., and other adjacent origins, to Martins Creek, Pa. and (2) The present movement of wheat by rail from Buffalo, N. Y. to Martins Creek. The proposed unit train rates cover work performed by the Soo Line in moving the trains to Chicago and by the Erie-Lackawanna Ry. in moving the trains from Chicago to Martins Creek. During the period of open navigation on the Great Lakes, i.e., April 1 to December 15, the rate proposed for this service is 72.25 cents per cwt. During the winter, or period of closed navigation, a rate of 88 cents per cwt. is proposed.*

Protestants are informed by the Erie-Lackawanna that the 72.25 cent rate is designed to equalize the present cost to the involved shipper, ConAgra, Inc., on shipments of wheat transported by water-rail service via Buffalo. The rail portion of this movement is from Buffalo to Martins Creek at the present rate of 40 cents per cwt. applicable on shipments loaded in five cars, with a minimum of 200,000 pounds per car. The 88 cent rate is reported to be the amount required to equalize the present cost available to the shipper in movements handled in all rail service via Buffalo. The latter operation consists of unit train service into Buffalo combined with rail service out of Buffalo to Martins Creek at the present five-car rate.

---

* More specifically it is proposed that the rate of 72.25 cents per cwt. would be effective from November 1, 1973 through December 14, 1973 and from April 1, 1974 through September 15, 1974. The rate of 88 cents per cwt. would be effective from December 15, 1973 through March 31, 1974.

Transportation of wheat from Buffalo to Martins Creek at the present rate of 40 cents per cwt. involves a movement of approximately 344 miles over the Erie. In contrast, the proposed unit train rate entails a 910 mile movement over the Erie from Chicago to Martins Creek. The Erie's division of the proposed through rates is not a matter of record; however, according to the best information available to protestants, it appears that the Erie's portion is most certainly in the range between 60 and 65 percent of the through rate. This means that the Erie will receive from 43.4 to 47 cents of the through rate of 72.25 cents and from 52.8 to 57.2 cents per cwt. if any unit train shipments are carried at the 88 cent rate. It is the purpose of my study to analyze the revenues and costs of the Erie-Lackawanna pertaining to the proposed unit train operation compared with the present five-car service to determine the revenue contribution provided by each service.

## Results of Study

The results of my study are contained in Tables 1, 2 and 3, hereto. Table 1, consisting of two pages, shows the revenue contribution derived under the present five-car rate from Buffalo to Martins Creek compared with contribution which would be derived by the Erie-Lackawanna at the proposed unit train rates. Table 2 shows the development of variable costs applicable to the present movement of wheat in covered hopper cars via the Erie-Lackawanna from Buffalo to Martins

Creek. Table 3 shows the development of variable costs for the movement of wheat in covered hopper cars via the Erie-Lackawanna in unit train service from the interchange with the Soo Line at Chicago, Ill. to Martins Creek. An explanatory statement, also attached, explains in detail the procedure used in developing the rail costs.

Referring to Table 1, Sheet 1, revenue of 40 cents per cwt. is shown under the present movement compared with 43.4 to 47 cents, computed at divisional factors of 60 percent and 65 percent, respectively, under the proposed movement. For the purpose of this comparison, the divisional percentages are applied to the through rate of 72.25 cents which will apply on the predominant portion - if not all - of the involved tonnage to Martins Creek. It will be noted that the revenue-cost comparisons are separately shown for movements in covered hopper cars provided by the Soo Line and by shippers. According to the rail carriers' pleadings in Suspension No. 57287 (I.& S. 8784), if railroad-owned cars are used they will be provided by the Soo Line; however, the involved unit train tariff provides that shipper-owned or leased cars may be used (Item 110 reference to Agent B. B. Maurer's Mileage Tariff 7-C, I.C.C. H-54). It will be seen that the revenue contribution per cwt., i.e., the excess of revenue over variable costs, amounts to 23.8 cents on the present movement compared with 16.7 to 20.3 cents for proposed movements in railroad-owned cars and 15.6 to 19.2 cents for proposed movements in shipper cars. Thus, there will be a revenue diminution of from 3.5 to 8.2 cents per cwt. at the proposed rate of 72.25 cents as compared with the present rail rate.

Respondent rail carriers previously showed in their reply to protests in Suspension Board Case No. 57287 (I.& S. 8784) that the annual grind of wheat at Martins Creek would be 129,000 tons based on a normal six-day work week. According to the best information available to protestant milling companies, approximately 80 percent of ConAgra's wheat requirements, since commencement of operations at the Martins Creek and Sandt's Eddy facilities, has been moved to the plant by rail from Buffalo. On this basis, 2,064,000 cwt. could be transported annually by the Erie to the Martins Creek facility at present rates. This rail movement would occur after movement by either lake vessel or rail unit train into Buffalo. The transportation of 2,064,000 cwt. at present rates would generate annual revenue contribution of $491,232. The movement of this same amount of tonnage at the proposed unit train rate of 72.25 cents would provide to the Erie annual revenue contribution of from $344,688 to $418,992 when railroad-owned cars are used and from $321,984 to $396,288 when shippers' cars are used. Thus, if all of ConAgra's annual wheat requirements move at the 72.25 cent rate, the Erie-Lackawanna will earn from $72,240 to $169,248 less under the proposed unit train rates than it is presently earning under the five-car rates applicable from Buffalo to Martins Creek.

The above calculations are necessarily based on certain assumptions concerning the volume of traffic which would be moved under the proposed rates as compared with the present rates. The key assumptions made in this regard are the 80 percent figure used for the rail proportion of total traffic volume and the application of the Erie's portion of the 72.25 cent through rate to the total annual rail volume. According to information which protestant milling companies have been able to develop, a large percentage of the wheat now being transported to the ConAgra facility at Martins Creek is moving via the Erie-Lackawanna from Buffalo. Protestants believe that this rail movement accounts for at least 80 percent of the total wheat tonnage to Martins Creek. According to information obtained by protestants the balance of the tonnage presently moved southbound from Buffalo to Martins Creek is via itinerant exempt truck transportation, possibly in connection with northbound movements of coal to the Buffalo area.

The use of the 80 percent rail factor, in my opinion, results in a conservative evaluation of the shift in net contribution. Rail proponents of the proposed rates have indicated that the rates are designed with present water-rail and all rail costs in mind. Under this premise, it might fairly be assumed that rail movements comprise the bulk, perhaps as much as 100 percent, of the total. If it were found that an amount greater than 80 percent of the total were moving by rail, the reduction in revenue contribution shown in my study at proposed rates compared with present rates would have been even greater.

As previously stated, an assumption implicit in the data developed in Table 1, Sheet 1, is that all of the tonnage transported by rail in the proposed unit train service will move at the 72.25 cent rate rather than at that rate for 8½ months of the year and at the 88 cent rate for 3½ months of the year. This assumption is reasonable since it is apparent that ConAgra would utilize the 72.25 cent rate to the fullest extent possible rather than pay the 88 cent rate, which is almost 16 cents per cwt. higher. ConAgra could, and in all probability would, transport the predominant portion, if not all, of its wheat requirements at the 72.25 cent rate available during the period from

April 1 through December 14. This would entail storage of the grain at Martins Creek and Sandt's Eddy during the winter season; however, this should present no storage problem to ConAgra since the elevators at those facilities are capable of storing 2.5 million bushels (from ConAgra's reply to Petitions for Suspension No. 57287). This capacity is equivalent to 1,500,000 cwt. of wheat or about 58 percent of ConAgra's annual wheat requirements.

Another factor which would lessen the possibility of movements at the 88 cent rate is the probable use of exempt for-hire truck transportation during the winter. If, as protestant milling companies believe, 20 percent of present tonnage is transported to Martins Creek by truck from Buffalo, it would appear that present for-hire truck costs are competitive with the present rail five-car rates. Thus, it would seem likely that any tonnage moved after December 15, the effective date of the 88 cent rate, could move in rail-for-hire truck service rather than in unit train service at the 88 cent rate.

In the light of these circumstances, it is protestant milling companies' belief that little, if any, of ConAgra's annual wheat tonnage would move at the higher winter rate. Certainly, it cannot be assumed that wheat shipments would be spaced uniformly throughout the year, resulting in the transportation of 29 percent of the wheat at the higher winter rate for 3½ months. On the other hand, there might be some possibility of limited use of the higher rate. In order to take such movements into account in the comparison of revenue contribution at the proposed and present rates, the data shown in Table 1, Sheet 2, have been developed.

The data shown in Table 1, Sheet 2, are based on the assumption that 90 percent of the annual tonnage will move at the 72.25 cent rate applicable from April 1 to December 14 and the remaining 10 percent will move at the 88 cent rate applicable during the remainder of the year. For the reasons provided above, it is believed that the 10 percent factor gives ample recognition to any tonnage which might possibly move under the 88 cent rate. The development of the revenue contribution per cwt. in Sheet 2 is identical to the procedure followed in Sheet 1 of Table 1. It will be seen from Sheet 2 that at the present rate, covering five-car shipments from Buffalo to Martins Creek, the Erie derives total annual revenue contribution of $491,232. The combination of the proposed rates of 72.25 cents and 88 cents per cwt. would produce a lesser amount of contribution for the Erie. With a 60 percent division of the through rates the Erie's annual contribution would amount to $364,089 with the use of railroad-owned cars and $341,386 with shipper cars. With a 65 percent division, the contribution would amount to $440,045 in railroad-owned cars and $417,341 in shipper cars. This annual contribution based on a weighting of the proposed rates is from $51,187 to $149,846 less than the contribution earned at the present rates.

APPENDIX D
Page 1 of 6

DONELAN, CLEARY AND CALDWELL
ATTORNEYS AND COUNSELORS AT LAW
914 WASHINGTON BUILDING
15TH STREET & NEW YORK AVENUE, N. W.
WASHINGTON D. C. 20005

JOHN F. DONELAN
JOHN M. CLEARY
JOHN H. CALDWELL

FREDERIC L. WOOD
JOHN K. MASER III

October 12, 1973

Honorable Robert L. Oswald
Secretary
Interstate Commerce Commission
Washington, D. C. 20423

Dear Sir:

Pursuant to 49 C.F.R. 1001.4, this letter is a formal request to inspect records now in the possession of the Commission's staff. The request is made on behalf of General Mills, Inc., International Multifoods Corporation, Peavey Company, The Pillsbury Company, Standard Milling Company, ADM Milling Company and Ross Industries, Inc. (hereafter referred to as Petitioners).

Petitioners request access to the following records: Car Shortage Figures (i.e., the number of cars ordered but not provided) with respect to the covered hopper rail cars of the Soo Line Railroad Company for the period commencing August, 1972 to the present. Petitioners understand such records are maintained by and in the possession of the Commission's Section of Railroads. Petitioner's telephonic request for access to this information through the Chief of the Section of Railroads was denied on the ground that such information is not considered to be of a public nature. Accordingly, Petitioners are making this formal request pursuant to the Freedom of Information Act, 49 C.F.R. §552.

The car shortage data here requested are in fact of a public nature in accordance with both the letter and the spirit of 5 U.S.C. §552, and should, therefore, be made available. Section 552 does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in that section. (See 5 U.S.C. §552c). The information here requested is not specifically authorized by Section 552 to be withheld from the public. In particular, the requested information is not embraced within Sub-section (b) of Section 552, U.S.C. §552(b).

Petitioners have an immediate compelling need for access to the requested information. Petitioners operate flour milling facilities in both the midwest and the east, and are actively involved in seeking to serve eastern flour markets. The Soo Line Railroad Company and Erie Lackawanna Railway Company have recently published new, reduced, unit train rates on wheat from origins in Minnesota and Wisconsin to Martins Creek, Pennsylvania, the situs of a milling facility operated by ConAgra, Inc. The new rates are contained in Soo Line Freight Tariff 543-B, I.C.C. 7337, issued September 28, 1973, to be effective November 1, 1973. This tariff schedule is under intensive review by Petitioners with respect to the lawfulness of the newly proposed rates. The requested information is essential to Petitioners in their analysis of whether or not the new tariff schedule violates the Interstate Commerce Act, requiring suspension and investigation by this Commission.

Accordingly, Petitioners respectfully request that the car shortage figures in the possession of the Commission with respect to the covered hopper rail cars of the Soo Line Railroad Company for the period commencing August, 1972, to the present be made available for inspection and copying. Further, in view of the due date for filing of protests for seeking suspension and investigation of the above specified tariff, *viz.*, October 23, 1973, Petitioners urge that the Commission grant the instant request as promptly as possible.

Respectfully yours,

John F. Donelan
JOHN F. DONELAN
John H. Caldwell
JOHN H. CALDWELL
John K. Maser
JOHN K. MASER III

Attorneys for:

General Mills, Inc.
International Multifoods Corp.
Peavey Company
The Pillsbury Company
Standard Milling Company
ADM Milling Company
Ross Industries, Inc.

cc: Fordyce W. Crouch, Esq.
Vice President and
General Counsel
Soo Line Railroad Co.
Soo Line Building
Minneapolis, Minn. 55440

APPENDIX D
Page 3 of 6

Interstate Commerce Commission
Washington, D.C. 20423

OFFICE OF THE SECRETARY

[illegible]

John F. Donelan, Esq.
John H. Caldwell, Esq.
John K. Maser III, Esq.
914 Washington Bldg.
15th St. & New York Ave., N. W.
Washington, D. C. 20005

Gentlemen:

This is in response to your letter petition of October 12, 1973, on behalf of various named flour milling companies, requesting "that the car shortage figures in the possession of the Commission with respect to the covered hopper rail cars of the Soo Line Railroad Company for the period commencing August, 1972, to the present be made available for inspection and copying" by you pursuant to the Freedom of Information Act, 5 U.S.C §552. I must advise you that, under the provisions of that Act, specifically Section 552(b)(4), this information, to the extent and in the form which the Commission posses it, is exempt from the Act's public disclosure requirements.

I am informed that the only information within the ambit of your request has been provided to this Commission by the Association of American Railroads, voluntarily and confidentially, with a restriction against publication. It is clear from the legislative history and subsequent interpretations of the exception contained in Section 552(b)(4) of the Act that Congress intended this exception to cover trade secrets and commercial or financial information which is given to an agency in confidence, since citizens must be able to confide in their government, and since in instances where the Government has obligated itself in good faith not to disclose documents or information which it so receives, it should be able to honor such obligations.

In view of the above, I must deny the request.

Sincerely yours,

Robert L. Oswald

Robert L. Oswald
Secretary

DONELAN, CLEARY AND CALDWELL
ATTORNEYS AND COUNSELORS AT LAW
914 WASHINGTON BUILDING
15TH STREET & NEW YORK AVENUE, N. W.
WASHINGTON, D. C. 20005

JOHN F. DONELAN
JOHN M. CLEARY
JOHN H. CALDWELL

FREDERIC L. WOOD
JOHN K. MASER III

TEL (202) 783-1215

October 19, 1973

Honorable George M. Stafford
Chairman
Interstate Commerce Commission
Washington, D. C. 20423

Dear Sir:

By letter dated October 12, 1973, a formal request to inspect records now in the possession of the Commission's Staff was made in behalf of General Mills, Inc., International Multifoods Corporation, Peavey Company, The Pillsbury Company, Standard Milling Company, ADM Milling Company and Ross Industries, Inc. (hereafter referred to as Petitioners). Pursuant to 49 C.F.R. §1001.4, this request was directed to the Secretary, Interstate Commerce Commission.

Therein, Petitioners requested access to the following records: Car Shortage Figures (i.e, the number of cars ordered but not provided) with respect to the covered hopper rail cars of the Soo Line Railroad Company for the period commencing August, 1972 to the present. Petitioners noted that they have an immediate compelling need for access to the same inasmuch as the requested information is essential to Petitioners in their analysis of whether or not a new tariff schedule (Soo Line Freight Tariff 543-B, I.C.C. 7837, issued September 28, 1973, to be effective November 1, 1973) violates the Interstate Commerce Act, requiring suspension and investigation by this Commission.

Petitioners are now in receipt of a letter, dated October 17, 1973, from the Honorable Robert L. Oswald, Secretary, Interstate Commerce Commission, wherein Petitioners' request is denied. (For convenience, copies of Petitioners' letter dated October 12, 1973 and Secretary Oswald's letter dated October 17, 1973, are attached. In support of this denial Secretary Oswald states, in part, as follows:

> "I must advise you that under the provisions of that Act [Freedom of Information Act, 5 U.S.C. §552], specifically Section 552(b)(4), this information . . . is exempt from the Act's public disclosure requirements."

As Petitioners stressed in their letter dated October 12, 1973, the car shortage data here requested are in fact of a public nature in accordance with both the letter and the spirit of 5 U.S.C. §552, and should, therefore, be made available. Section 552 does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in that section. (See 5 U.S.C. §552c) The information here requested is not specifically authorized by Section 552 to be withheld from the public. In particular, the requested information is not embraced within sub-section (b) of Section 552, 5 U.S.C. §552(b).*

Accordingly, pursuant to 49 C.F.R. §1001.4, this letter represents a formal appeal from the aforementioned ruling of the Secretary, dated October 17, 1973.

Recently, the United States Court of Appeals, District of Columbia Circuit, had occasion to discuss exemptions from disclosure under the Freedom of Information Act. In Vaughn v. Rosen, decided August 20, 1973, U.S. Court of Appeals, District of Columbia Circuit (reported at 42 Law Week 2138) the court stated, in part, as follows:

> "The Freedom of Information Act was conceived in an effort to permit access by the citizenry to most forms of government records. In essence,

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*That the requested information is presently being provided to the Commission by the Association of American Railroads on a voluntary and confidential basis provides no valid reason under the Freedom of Information Act for concluding that this information is exempt, pursuant to Section 552(b)(4). The Commission could require these data from the carriers by virtue of Section 20 of the Interstate Commerce Act, 49 U.S.C. §20. The fact that the Commission does not now require these data and that the carriers choose to call the same confidential (while at the same time providing the same to the Commission) does not cause this information to be of a non-public nature.

> the Act provides that all documents are available to the public unless specifically exempted by the Act itself. This court has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act. By like token and specific provision of the Act, when the Government declines to disclose a document the burden is upon the agency to prove de novo in trial court that the information sought fits under one of the exemptions to the FOIA. Thus the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure."

In the light of all the foregoing Petitioners respectfully request that the car shortage figures in the possession of the Commission with respect to the covered hopper rail cars of the Soo Line Railroad Company for the period commencing August, 1973, to the present be made available for inspection and copying. Further, in view of the due date for filing of protests for seeking suspension and investigation of the above specified tariff, viz., October 23, 1973, Petitioners urge that the Commission grant the instant request as promptly as possible.

Respectfully yours,

JOHN F. DONELAN

JOHN H. CALDWELL

JOHN K. MASER III

Attorneys for:

General Mills, Inc.
International Multifoods Corp.
Peavey Company
The Pillsbury Company
Standard Milling Company
ADM Milling Company
Ross Industries, Inc.

cc: Fordyce W. Crouch, Esq.
Vice President and
General Counsel
Soo Line Railroad Co.
Soo Line Building
Minneapolis, Minn. 55440

## RULES AND OTHER GOVERNING PROVISIONS

BEST COPY AVAILABLE

### SPECIAL RULES AND REGULATIONS
### UNLIMITED

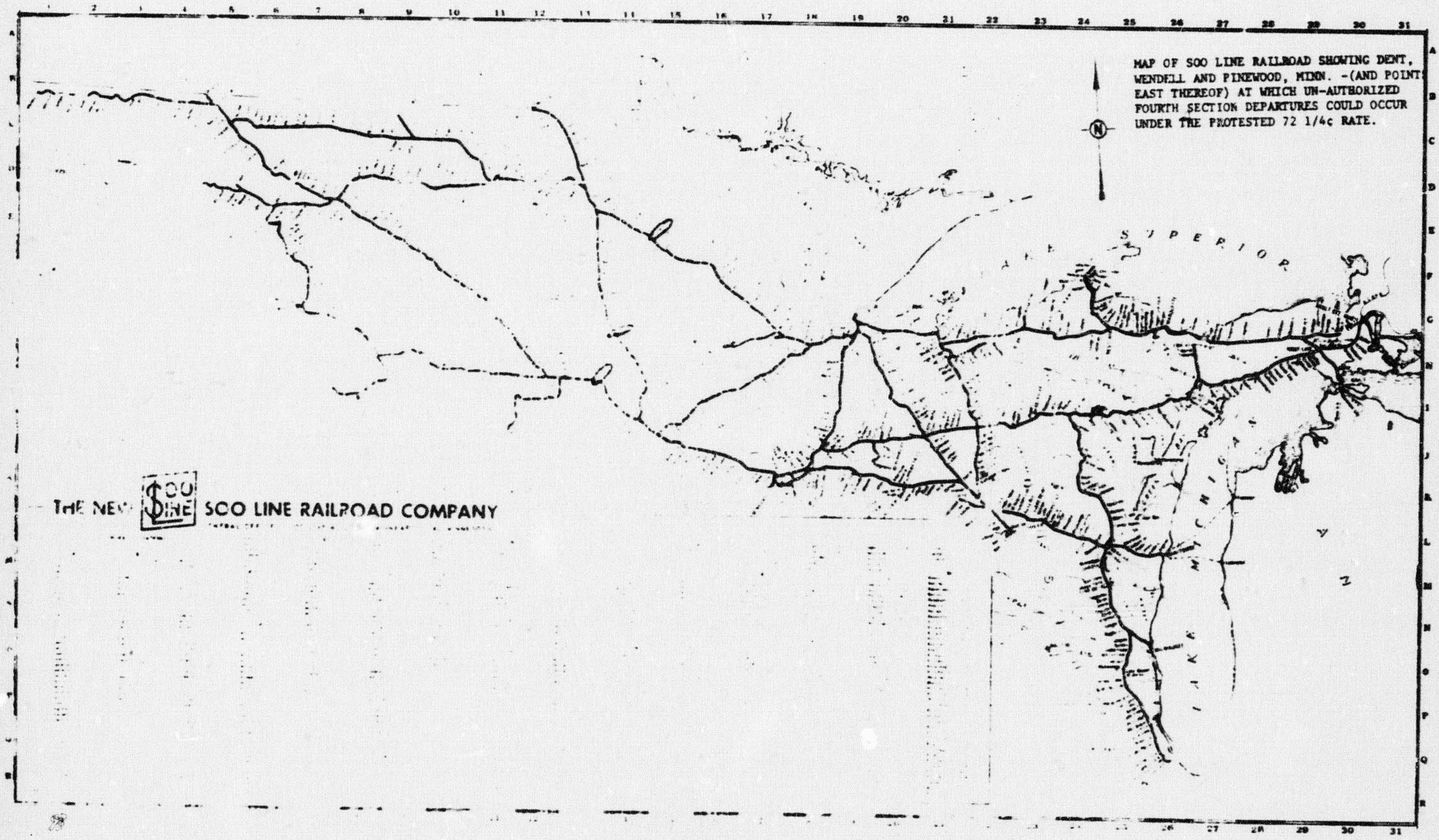
| ITEM | SUBJECT | APPLICATION |
|---|---|---|
| ~~223~~<br>~~401~~ | ~~N&W~~ | ~~On Grain and Grain Products to N&W Stations 1635 Radford, Va. to 2490 Bristol, Va.-Tenn. and 2890, Bluefield, Va. to 3430 Norton, Va., apply rates to Norfolk, Va.~~ |

### SPECIAL RULES AND REGULATIONS
### LIMITED

| ITEM | SUBJECT | APPLICATION |
|---|---|---|
| 226<br>520-E | RE-SHIPPING OR PROPORTIONAL RATES FROM CHICAGO, JOLIET, KANKAKEE, MILWAUKEE, MANITOWOC, etc. | (Applicable only when specific reference is made to this item)<br>(a) Rates apply as re-shipping or proportional rates applicable on traffic reaching the reshipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point. Rates also apply on through billed shipments not stopped in transit at re-shipping points subject to this application.<br>(b) Provided, that in no case shall the combination through rate to and from the re-shipping point via rail be less than the rate from the re-shipping point applicable on a shipment originating thereat to final destination, the difference necessary to protect such rate from the re-shipping point to be added to the re-shipping rate therefrom. (See Exception 1 and 3 below).<br>(c) In no case shall the combination through rate to and from the reshipping point via rail be less than the single factor through commodity rate from original shipping point to final destination named herein, which shall be the minimum through rate, the difference necessary to protect such minimum through rate shall be added to the re-shipping rate from the reshipping point. The provisions of Paragraph (c) will not apply in connection with application of Items 355, 356 and 437. (See Exception 2 and 3 below).<br>These rates are applicable on Ex-Lake shipments as of the date such shipments leave the lake port.<br>These rates are applicable on shipments which arrive at Chicago, Ill., by River or Canal. The rates covered hereby are applicable as of the date from point of origin as shown on the shipping directions surrendered at Chicago, Ill.<br>The Ex-Lake Grain and/or Grain Product rates will apply only on Grain and/or Grain Products which arrive at Chicago, Milwaukee or Manitowoc via lake, also on Grain Products milled from Grain which arrives at these ports via lake. The Ex-Lake rates covered hereby are applicable as of the date shipments leave the respective points named herein.<br>The Ex-River or Ex-Canal Grain and/or Grain Products rates will apply only on Grain and/or Grain Products which arrive at Chicago, Ill., via river or canal, also on Grain Products milled from Grain which arrive at Chicago, Ill., via river or canal. The rates covered hereby are applicable as of the date from point of origin as shown on the shipping directions surrendered at Chicago, Ill.<br>These rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.<br>EXCEPTION 1.-The provisions of paragraph (b) as to the application of the rate on shipments originating at the re-shipping point as minima will not apply in connection with:<br>(1) Shipments moving to Chicago, Ill. via River or Canal.<br>(2) Shipments of Malt and Malt Sprouts, CL, originating at Jefferson Junction, Wis.<br>(3) Shipments of Corn and Corn Products named in Item 437, originating at PCNY stations named in Item 437.<br>EXCEPTION 2.-The provisions of Paragraph (c) will not apply in connection with application of the proportional rate from Danville, Ill. on the C&EI (Station 285) (Item 1559.1), L&N (Station 11007.84) (Item 1559.1), N&W (Station 1105) (Item 1559.2), PCC (Station 16905) (Item 1559.3), PCW (Station 7900) (Item 1559.5) on domestic rates on Corn and Corn Products as described in Paragraph A of Item 1260.<br>EXCEPTION 3.-On through billed shipments of Starch and Dextrine the minimum through rate shall be the Grain Products flat rate from reshipping point to destination. |
| ~~226~~<br>~~535-A~~<br>~~(Concluded on following page)~~ | ~~TRAFFIC ORIGINATING IN ILLINOIS-IOWA-MISSOURI TERRITORY~~ | ~~(Applicable only when specific reference is made to this item)~~<br>~~Rates apply as re-shipping or proportional rates on traffic reaching the re-shipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill of like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point, and will only apply on such traffic when originating at points in ILLINOIS AND MISSOURI (See Item 536) and the following points in IOWA (See Item 536): Beck, Bellevue, Bettendorf, Buffalo, Bullard, Burlington, Camanche, Clinton, Davenport, Dubuque, Fairport, Ft. Madison, Green Island, Kemper, Keokuk, Le Claire, Linwood, Lyons, Montpelier, Montrose, Mooar, Muscatine, Patterson, Pleasant Valley, Princeton, Sabula, Sandusky, Shaffton, Shopton, Spring Grove, Tile Works, Viele, West Burlington, West Keithsburg, Wever, from which no single factor through commodity rates are in effect in connection with the in-bound carrier via the re-shipping point from original shipping point to final destination.~~<br>~~In no case shall the combination through rates to and from the re-shipping point be less than the through joint rates in effect on the commodity forwarded from the re-shipping point from the origin point of the Grain or Grain Products to final destination of the Grain or Grain Products via any route, nor less than the rate from the re-shipping point applicable on a shipment originating thereat to final destination, whichever may be the higher, the difference necessary to protect either of the above bases of rates as minimum, to be added to the re-shipping or proportional rates from the re-shipping point (See Exception).~~<br>~~(Item concluded on following page)~~ |

For explanation of reference marks, see concluding page of this supplement.

## APPENDIX F



MAP OF SOO LINE RAILROAD SHOWING DENT, WENDELL AND PINEWOOD, MINN. -(AND POINTS EAST THEREOF) AT WHICH UN-AUTHORIZED FOURTH SECTION DEPARTURES COULD OCCUR UNDER THE PROTESTED 72 1/4c RATE.

N
LAKE SUPERIOR
LAKE MICHIGAN
THE NEW SOO LINE SOO LINE RAILROAD COMPANY

ORIGINAL 14

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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# PROTEST AND PETITION FOR SUSPENSION AND INVESTIGATION OF THE MARITIME ADMINISTRATION

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59923

EFFECTIVE DATE : November 1, 1973

TARIFF REFERENCE: Soo Line Freight Tariff 543-B, ICC 7837

COMMODITY : Wheat, in bulk, in covered hopper cars having capacity of 4500 cubic feet and over

FROM : Duluth, Minnesota; Minneapolis, Minnesota; Minnesota Transfer, Minnesota; St. Paul, Minnesota; and Superior, Wisconsin

TO : Martins Creek, Pennsylvania

ROBERT O. FOERSTER, III.
Trial Attorney
Maritime Administration

The Maritime Administration, U.S. Department of Commerce, respectfully petitions that the Commission suspend and enter upon an investigation into the reasonableness and lawfulness of the Soo Line Railroad Company's freight tariff 543-B, ICC 7837. In support thereof, Protestant Maritime Administration avers the following:

1. The Maritime Administration is the agency of the federal government charged with the responsibility to develop and maintain the nation's merchant marine under the Merchant Marine Act, 1936, as amended. In this capacity it has the duty to foster the development of a merchant marine which is sufficient to carry the domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States. The maintenance of a strong domestic fleet on the Great Lakes' waterways is implicit in this delegation of authority.

2. This policy is further exemplified in the Merchant Marine Act of 1970, P.L. 91-469. Section 26 thereof designated the Great Lakes as the fourth seacoast of the United States. That Act also extended to Great Lakes' carriers the resources of the Maritime Administration with regard to research and development, promotion and financial aid such as tax deferred capital, construction funds to encourage shipbuilding, construction and operating subsidies, and ship mortgage guarantees.

3. Additionally, the National Transportation Policy which appears as a preamble to the Interstate Commerce Act mandates the fair and impartial regulation of all modes of transportation so as to recognize and preserve the inherent advantages of each with the objective of developing, coordinating

and preserving a national transportation system by water, rail and highway which is adequate to meet the needs of the commerce of the United States and the national defense.

4. The rates proposed by the Soo Line Railroad Company in connection with the Erie Lackawanna Railway Company in Freight Tariff 543-B will seriously undermine the economic viability of the water carriers operating in the Great Lakes. Traditionally, grain has moved from Duluth and Superior to Buffalo by water carrier. From Buffalo, the grain moved by rail to Martins Creek. Under proposed Soo Line Freight Tariff 543-B, the grain will move the Martins Creek completely by rail at a rate significantly lower than the total water-rail rate despite the fact that the water-rail route is the lower cost route. Historically, water carriers have always been able to carry bulk commodities more economically than rail carriers and have been able to pass this cost advantage on to shippers.

5. Under the Soo Line proposal, the water carriers' inherent cost advantage will be lost, and said carriers will have to lower their rates to a non-compensatory level in order to meet Soo Line and Erie Lackawanna's competition. Such a result would violate our National Transportation and Merchant Marine Policies.

Respectfully submitted,

ROBERT O. FOERSTER, III.
Trial Attorney
Maritime Administration

**U.S. DEPARTMENT OF COMMERCE**
**Maritime Administration**
Washington, D.C. 20235

Before the

INTERSTATE COMMERCE COMMISSION

SUSPENSION DOCKET NO. 59923

# REPLY TO PROTESTS AND PETITIONS FOR SUSPENSION

| | |
|---|---|
| EFFECTIVE DATE: | November 1, 1973 |
| TARIFF REFERENCE: | Soo Line Tariff 543-B, ICC 7837 (in its entirety) |
| COMMODITY: | Wheat, In Bulk |
| TERRITORY: | From Duluth, Minneapolis, Minnesota Transfer, and St. Paul, Minnesota, and Superior, Wisconsin, to Martins Creek, Pennsylvania |

CONAGRA, INCORPORATED

By Donald Macleay
Peter A. Greene
Its Attorneys

Of Counsel:

MACLEAY, LYNCH, BERNHARD & GREGG
1625 K Street, N. W.
Washington, D. C. 20006

Dated: October 25, 1973

Before the

INTERSTATE COMMERCE COMMISSION

SUSPENSION DOCKET NO. 59923

## REPLY TO PROTESTS AND PETITIONS FOR SUSPENSION

Comes now ConAgra, Incorporated (ConAgra), and files this reply to the protests and petitions for suspension filed herein.

## I

## THE PROPOSED RATE

The protested rate is published in Soo Line Freight Tariff No. 543-B, ICC No. 7837. It is a proportional rate published to apply on wheat from Duluth, Minneapolis, Minnesota Transfer, and St. Paul, Minnesota, and Superior, Wisconsin, to Martins Creek, Pennsylvania, when routed via Soo Line-Chicago, Erie Lackawanna. The proposed rate is applicable on shipments having a minimum weight of 190,000 pounds per car used and further restricted in its application to a minimum of three consecutive unit-train movements with a minimum per movement of 5,000 tons. Each movement must be tendered on one bill of lading, on a single day, fron one consignor at one location at origin, to a single consignee, at one location at destination where all cars must be completely unloaded. Shipments will receive 24 hours free time for loading the entire shipment at origin and 36 hours free time will be provided for unloading the entire shipment at destination. In the event the entire shipment is not tendered to a carrier for movement to destination within 24 hours after placement, actual or constructive, detention charges in the amount of $475.00 for each 24 hour period or fraction thereof subsequent to free time shall be assessed. When empty cars are not tendered after unloading within thirty six (36) hours after placement, actual or constructive, a detention charge of $9.50 per car will be assessed on all cars in the unit-train for each 24 hour period or fraction thereof, subsequent to the expiration of free time. Intermediate application at destination will apply. Normal terminal or transit services and privileges such as weighing, inspection, diversion or reconsignment will not apply. The provisions of agent B. B. Maurer's Mileage Tariff No. 7-B, ICC H-43 will apply.

The level of the proposed rate between April 1 and December 14 (which corresponds to the period of open navigation on the Great Lakes) is 72-1/4¢ per cwt. Between December 15 and March 31 (which corresponds to the period of closed navigation on the Great Lakes) the level of the proposed rate is 88¢ per cwt.

## II

## PRELIMINARY STATEMENT

The protests which have been filed in opposition to the proposed rate fall into two basic categories. First, there are the protests of ConAgra's flour milling competitors. The second category are the carrier competitors of EL and/or Soo Line and related port interests. In order to facilitate brevity and to eliminate duplication in making our response, we have undertaken to consolidate our replies in accordance with those two basic classifications of protestants.

ConAgra will undertake to respond to all but the most inane of protestants' contentions. There are, however, several points which have a bearing on the more prominent assertions of protestants which warrant special emphasis and should be borne in mind throughout the Board's consideration of our entire response. They are as follows:

- The proposed rate will result in transportation charges to ConAgra no lower than those which it presently incurs.

- ConAgra is presently shipping substantial quantities of grain to Martins Creek and the only question to be resolved in this controversy is whether Soo Line will be permitted to originate such traffic for tender to EL for delivery or if the lake carriers will be permitted to maintain their present monopoly on such traffic.

- The miller protestants who control elevation facilities at Duluth/Superior and Buffalo and the lake carrier protestants presently have an anticompetitive stranglehold on the flow of grain to eastern markets which they are here fighting to retain.

- Although protestants seek to inject the issue of car supply, ConAgra has during the past year leased 250 jumbo covered hopper cars for use in supplying grain to its flour mills representing a commitment which more than offsets the 50 cars which would be used in this movement.

## III

## REPLY TO ALLEGATIONS OF COMPETING MILLERS

General Mills, Inc., International Multifoods Corporation, Peavey Company, The Pillsbury Company, Standard Milling Company, ADM Milling Company and Ross Industries, Inc., filed a joint protest which embraces all opposition of actually or allegedly competitive milling interests.*

General Mills, International, Peavey, Pillsbury, and Standard all operate substantial mills at Buffalo, New York, and their opposition is based upon the alleged impact of the proposed rate on those mills. ADM's opposition is predicated upon the alleged impact of the proposed rate on its mill at Minneapolis and Ross bases its opposition on the alleged impact of the proposed rate on its mills in Kansas (Joint Protest, p. 6).

The most vigorous opposition to the proposed rate comes from the Buffalo milling interests, which take the position that the proposed rate would provide Conagra with a significant competitive advantage in the New York and Philadelphia bakery flour markets and that it would permit Conagra to seriously disrupt existing marketing patterns in those areas to an extent which would threaten the continued viability of their Buffalo operations. These arguments are based upon a total disregard of two crucially important facts. First, the proposed rate represents no reduction in Conagra's transportation costs but merely affords Conagra a choice of who to buy their grain from and how to ship it which, incidentally, are choices already available to the protesting Buffalo millers. Second, protestants ignore the fact that ConAgra's mill at Martins Creek is presently in full operation and ConAgra is presently selling its flour in the Mid-Atlantic market.

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*The joint protest is adopted by a telegraphic protest on behalf of the unidentified members of the Kansas-Missouri River Mills Association.

The most serious defect in protestants' presentation is the underlying assumption that the proposed rate represents a reduction in ConAgra's present transportation cost of delivering grain to Martins Creek. ConAgra currently uses grain at Martins Creek which moves from Duluth/Superior to Buffalo at 16¢ per bushel or 26.67¢* per cwt., is transferred at Buffalo for 5¢ per cwt. and is moved to Martins Creek by truck at 22¢ per bushel or 37¢ per cwt. (See Exhibit 1 ) or by rail via EL at 40¢ per cwt. (EL Freight Tariff 146, ICC 174 , X-299). This adds up to a total cost of 68.67¢ per cwt. to 71.67¢ per cwt. as compared to the proposed rate of 72-1/4¢ per cwt. during open navigation season.** During closed navigation season the proposed rate is 88¢ per cwt. which is exactly equal to the Minneapolis and Duluth/Superior to Buffalo unit train rate of 43¢ per cwt. (See Soo Line Tariff No. 526-I, ICC No. 7755), 5¢ transfer cost at

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* As confirmed by the protest of the Lake Carriers Association, p. 4, current lake freight from Duluth/Superior to Buffalo is 16¢ per bushel which converts to about 26.67¢ per cwt.

** See Exhibit 2.

Buffalo and 40¢ rail rate to Martins Creek (EL Tariff No. 146 ICC No. 174 , X-299).

Thus, ConAgra, even with the availability of the proposed rate, will still be operating at substantially the same rate disadvantage as presently exists. For example, as shown in Exhibit 3 the cost to Buffalo mills to move wheat to Buffalo and flour to such representative points as Philadelphia, Pa., Hackensack, N.J., and Brooklyn and Jamaica, N.Y., is 88¢ per cwt. In contrast, the cost to ConAgra to move grain to Martins Creek and deliver flour by truck* to the same destinations ranges upwards from $1.03-1/4 per cwt.

A major consideration in allowing ConAgra the option of all rail movement of wheat to Martins Creek is one which the Buffalo milling interests have understandably failed to mention in their presentations. However, it is one which is vital to an understanding of their real motivation in opposing the proposed rate just as they have opposed every other attempt by progressive millers to break the stranglehold that the Buffalo millers have on the entire eastern flour market. At the present time ConAgra has available to it only one feasible route of movement for receipt of wheat at Martins Creek via for-hire common carriage.* This routing is via lake vessel from Duluth/Superior to Buffalo and then via rail from Buffalo to Martins Creek via the EL five car rate of 40¢ per cwt. (EL Freight Tariff No. 146 , ICC No. 174 , X-299) or via motor carrier at 22¢ per bushel or 37¢ per cwt. (See Exhibit 1). The difficulty with that arrangement is that the Buffalo milling interests control virtually all of the elevation capacity at Buffalo. They also enjoy a similar position at Duluth/Superior. This means that ConAgra is presently in the totally untenable position of having to rely upon its competitors for its sole source of supply. We do not think that it is proper for us to be forced to remain in that position. ConAgra sincerely believes that this situation is one which can and should be alleviated by enlightened regulatory action rather than one which ConAgra is forced to resolve itself by recourse to private antitrust remedies.

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* ConAgra, of course, has the option of rail delivery from Martins Creek but the cost of such rail delivery would be so far in excess of truck delivery cost that it is not a serious alternative.

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* The Buffalo millers make much of the fact that ConAgra advised the Commission last year that, if an earlier attempt to provide ConAgra with competitive all rail rates failed, ConAgra would be forced to make a long term commitment to unregulated water/private truck movement. As noted by protestants, ConAgra did not commit itself to such an alternate method of transporting its grain requirements to Martins Creek. The publication by EL of multiple car rate from Buffalo to Martins Creek, the availability of for-hire truck movement of grain from Buffalo to Martins Creek, the unprecedented instability in the grain market precipitated by the Russian grain purchase and all of the other considerations that influenced ConAgra's managerial determination not to commit itself as yet to private carriage in delivering grain to Martins Creek need not be discussed in detail. All that need be said is that ConAgra cannot believe that the Commission will adopt protestants' suggestion that it should be penalized because it has chosen to continue to place maximum reliance upon regulated for-hire transportation rather than private carriage.

The second contention of protestants, namely that the proposed rate would somehow be disruptive of existing marketing patterns can be swiftly disposed of by reference to the facts. To begin with ConAgra's Martins Creek facility is already producing flour at optimum production levels. The grain which would move to Martins Creek under the proposed rate is already moving there now. For example, since March of this year ConAgra has moved in excess of 650,000 bushels of grain to Martins Creek. The flour produced at Martins Creek is presently being marketed in the Philadelphia and New York City metropolitan areas.

Also relevant to consideration of the protestants' specious arguments on this point is the fact that the potential market for mills located at Buffalo encompasses virtually the entire northeastern United States. Total annual flour consumption in that market is approximately 60,000,000 cwt. This figure is derived by applying the annual per capita consumption of 111 pounds to the 1970 population figures reported by the United States Census Bureau for the Middle Atlantic and New

England states. Our mill at Martins Creek, operating at full rated capacity is capable of producing about 1-1/2 million cwt. of flour annually. This means that we are in a position to compete for approximately 4% of the total market presently served by the Buffalo mills. Obviously such a small competitive potential can have no appreciable effect on the Buffalo mills.

Even more significant is the fact that our Martins Creek mill is so located that we can realistically compete with the Buffalo mills only in the New York, New Jersey and Eastern Pennsylvania markets (roughly a radius of 100 miles from our Martins Creek facility). We cannot compete with the Buffalo mills in any of the New England states or in any of the remainder of the Middle Atlantic states. Therefore, the Buffalo mills can and undoubtedly already have more than offset any loss of business that ConAgra might have caused them by devoting some of their capacity to areas where we cannot compete with them.

As far as the so-called competitive advantage is concerned we readily admit that our ability to deliver by truck on short notice, in small quantities, should be attractive to those bakeries within our service area which have facilities for receiving flour by truck.[*] This is due to the fact that prompt delivery in small quantities enable them to maintain lower inventories without risk of interruption in production.

Another advantage of truck delivery from a nearby milling location is that it minimizes the risk of interruption in delivery schedules as a result of such perils as rail work stoppages, serious weather problems such as hurricane Agnes, etc. Flour is a very basic item in daily nutrition requirements and any such interruptions have far reaching negative impact upon the consuming public. These obvious advantages to the consuming public far outweigh the purely self-interest considerations raised by protestants.

Under all of the foregoing circumstances it is clear that the protesting Buffalo milling interests will suffer no injury as a consequence of this proposed rate, that their only genuine motivation is to maintain their existing stranglehold on the flow of grain and grain products into the Eastern markets, and that theCommission's clear obligation to further the public interest requires that the existing untenable situation at Buffalo be eliminated immediately by allowing the proposed rate to become effective without suspension.

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[*] Actually, the great preponderance of commercial bakeries in this area are geared to receiving flour by rail and therefore will not be potential customers of ConAgra unless and until they invest in truck unloading facilities.

If, on the other hand, the proposed rate is suspended in response to their deceptive representations, the Buffalo mills will have achieved a further extension of their existing control of the eastern flour market at the expense of the consuming public. This would be a particularly unfortunate turn of events in view of the fact that these same protestants have successfully misused the Commission's suspension procedures in the past to fend off what the Commission ultimately determined to be "fair competition". In 1962 certain rail carriers published rates on grain and grain products from Pittsburgh which were suspended after Buffalo milling interests (the same interests who oppose this rate) raised essentially the same arguments as those which they have presented in this proceeding. In Grain, Pittsburgh, Pa., To Eastern Base Points, 322 I.C.C. 218, Division 2 found that such arguments were "speculative" and approved the proposed rates concluding that "We are not required to protect Buffalo from fair competition." 322 I.C.C. at 232. The Division's decision was affirmed by the entire Commission at 325 I.C.C. 669 in which the Commission noted at page 680 that:

> The fact that flour from the proposed mill might possibly displace Buffalo flour at certain of the destinations is not sufficient to support a finding of undue preference or prejudice. This merely represents normal competition. As indicated by the division, we are not required to protect Buffalo from all competition.

The Commission's decision was eventually upheld in State of New York v, United States, 256 F.Supp. 634 (1966), aff'd 386 U.S. 349, 18 L.Ed.2d 98 (1967). The rate which was in issue in that litigation continued in effect until just a few days ago but, unfortunately, the shipping public has been denied its effective use because the intended user abandoned its plans to build a mill at Pittsburgh during the pendency of the litigation. Undoubtedly protestants are hopeful of achieving the same result here where their anticompetitive objective is just as lacking in merit as it was in the Pittsburgh case. The Commission should not be deceived into playing into their hands a second time.

ADM also suggests that Minneapolis will be placed at a competitive disadvantage to Martins Creek under the proposed rate. (Joint Protest, pp. 31-33). This is obviously an argument of desperation. If, in fact, ADM actually sells flour in the eastern markets from its Minneapolis mill, a contention which is never actually made, it is presently doing so in direct competition with Buffalo mills with a combined annual milling capability of 21,000,000 cwts. Those mills can move grain to Buffalo for 31.67¢ (26.67¢ lake freight + 5¢ elevation at Buffalo) and flour to New York for 58¢ per cwt. (Penn Central Tariff No. 1722, ICC 3809) for a total delivered cost of 89.67¢

Under the proposed rate it will cost ConAgra 72-1/4¢ for rail delivery of grain to Martins Creek plus 2¢ for truck movement from rail head to elevator plus 34¢ per cwt. to move flour from Martins Creek to New York (Ex. 3 ). This results in a total cost of 108-1/4¢ per cwt. under which ConAgra could deliver a maximum of 1.5 million cwts. or only a small fraction of what the Buffalo mills grind. Obviously, the proposed rate can have no effect upon any position that ADM might have in the New York market, even ignoring the fact that ConAgra can presently serve the New York City market at exactly the same cost as under the proposed rate by using grain that moves across the lakes to Buffalo and thence to Martins Creek via truck at 37¢ per cwt. or via the EL five car rate of 40¢ per cwt.

Protestant millers also suggest that the proposed rate would be violative of Section 3(1) with respect to millers located in Kansas and other midwest points. It is established beyond serious question that a violation of Section 3(1) cannot be established without a showing of substantial similarity in transportation circumstances under which both the allegedly preferred and the allegedly prejudiced traffic are moving. Equally well established is the principle that existence of water competition for the traffic of the allegedly preferred shipper and the absence of such competition for the traffic of the allegedly prejudiced shipper fully justifies a lower rate for the former than for the latter. Newsprint Paper from Tenn. and Ala. to Houston, 313 I.C.C. 667, 675; Portland Freight Traffic Association v. No. Pacific Ry. Co., et al., 337 I.C.C. 826 (1970). There is no water movement of flour from midwest mills to eastern seaboard flour markets. Thus, the proposed rate cannot possibly be unduly or unreasonably prejudicial as to midwestern millers. This was pointed out quite succinctly in Docket No. 38371 Wheat in Multiple Car Shipments, Minn., Wisc. to Buffalo (1965, not printed in full). There Examiner Boisseree rejected essentially the same argument by essentially the same interests who raise it here, when he stated as follows at page 14 of the report which was adopted by the Commission:

> The Kansas protestants have not submitted a sound basis to support their requested finding that the trainload rate results in unlawful prejudice. The existence of the competitive mode of transportation via the Great Lakes on the spring wheat shipped from Minneapolis and Duluth to Buffalo, and the absence of this factor on like movements of wheat from Kansas City to the same eastern point, precludes a determination that circumstances and conditions attending the compared movements are similar.

The foregoing finding is equally dispositive of the representations of the midwestern milling interests in this proceeding.

Among the other would-be issues raised by miller protestants which warrant brief comment is the contention that the proposed rate is predicated upon outdated factors for cross-Lake and Buffalo elevation charges (Joint Protest, pp. 26-29). This of course is contradicted by the statement of the Lake Carriers Association which verifies the accuracy of the factor used for cross-lake charges which is 16¢ per bushel or 26.67¢ per cwt. and the 5¢ factor for elevation and inspection (Lake Carriers' Protest, p. 4). Unlike protestants, we have no crystal ball to tell us what lake freight rates will be in future years. It is precisely for this reason that under Item 140 of the proposed rate it has no application beyond September 14, 1974. This is the same date on which protestants' unit train rate from Duluth/Superior and Minneapolis/St. Paul, to Buffalo expires (See Soo Line Freight Tariff 526-I, ICC 7755). At that point the participating carriers can review the level of lake freight rates and make appropriate adjustments to both unit train rates simultaneously. Thus there is no more possibility that the proposed rate will be "annually understated" than there is of the Buffalo unit train rate being "annually understated".

Commencing at page 29 of their joint protest miller protestants also suggest that the historical rate relationship between Duluth/Superior, on the one hand, and, on the other, Minneapolis/St. Paul be destroyed. Protestants argue that since Minneapolis is not located on the Great Lakes it should not take a water-related rate. They conveniently overlook, however, the fact that virtually all rates from Minneapolis including the unit train rate to Buffalo, (See Soo Line Freight Tariff No. 526-I, ICC 7755) are at the same level as the rate from Duluth/Superior. If that relationship is to be destroyed such action is certainly not appropriate for a proceeding of this type. Rather it should be taken in a proceeding in which all interested parties can participate and in which all Minneapolis/St. Paul - Duluth/Superior relationships can be considered. Certainly where, as here, the proposed rate from Minneapolis/St. Paul is competitively justified independently of water competition by the mere existence of the unit train rate from Minneapolis/St. Paul to Buffalo there is no basis for denying the Minneapolis/St. Paul rate to ConAgra.

Although the relationship between handling and elevation costs at Duluth/Superior vs. Minneapolis/St. Paul have no relevance to propriety of rate parity from those two points, reference to those figures by protestants at page 30 of their joint protest provide an interesting insight into the anti-competitive barriers that these protestants impose upon their competitors. As previously noted ConAgra presently has no option but to move its grain to Martins Creek via the Lakes from Duluth/Superior to Buffalo. Protestants enjoy a dominant control over the transfer and elevator facilities at Duluth. As a result, according to protestants' own figures, ConAgra must pay 25¢ to 42¢ per cwt. at protestants' Duluth/Superior facilities for exactly the same service that it receives at Minneapolis for 11.7¢ to 12.5¢ per cwt. It is difficult to conceive of a more compelling justification for promptly freeing ConAgra from such unconscionable restraint by allowing the proposed rate to become effective without delay.

The miller protestants allege the existence of fourth section violations on the basis of highly imaginative comparisons of the proposed multiple car rate with various single car rates.* However, as the Commission has repeatedly held, ". . . in applying the fourth section like transportation services and charges must be compared." Coal From Ill., Ind., and Ky., To Ill. And Ind., 308 I.C.C. 673, 677; Terminal Refrigerating Co. v. Atchison, T. & S.F. Ry. Co., 178 I.C.C. 697, 701. Here, the proposed rates are unit train rates. The rates which protestants use to make their unfounded comparisons are single car rates. Thus, under long established precedent, including the above cited cases, there simply is no basis for a finding of any fourth section violations.

---

* This same specious argument constitutes the basic contention of the protest filed on behalf of the Chicago Board of Trade. Since that protest presents no argument worthy of comment other than what is already covered in our response to the protestant millers ConAgra sees no point in burdening the record with a separate repetitious response to the Chicago Board of Trade's protest.

In a final desperate effort to create an issue where none exists, miller protestants, beginning at page 44 of their protest, suggest the existence of various Section 6(1) violations. The speciousness of these arguments can best be demonstrated by reference to one typical example. At page 47 of their protest the millers state that the tariff does not indicate whether it is in compliance with Service Order 1120. If protestants had taken the trouble to look at Item 60. of the tariff they would have seen that it is expressly subject to all outstanding service orders.

## IV

## RESPONSE TO ALLEGATIONS OF LAKE CARRIERS AND RELATED INTERESTS

The opposition of the lake carriers and the Buffalo port interests to the proposed rate is based upon their desire to maintain their captive hold on all of the grain moving to ConAgra's Martins Creek facility. Although their arguments are embellished with many extraneous features that is essentially what their position boils down to.

The protests of the lake carriers and their supporters show an amazing similarity of content in that they all make meaningless comparisons between the proposed rate of 72-1/4¢ per cwt. and an unidentified single car rate of $1.15 from Minneapolis/

St. Paul and Duluth/Superior to Martins Creek. If a pound of traffic has moved to Martins Creek under such $1.15 rate it has moved for someone other than ConAgra since that rate is well above the rates presently available to ConAgra. During open navigation season it can come across the lakes to Buffalo from 26.67¢ per cwt. plus 5¢ elevation and transfer charge at Buffalo. It can then move from Buffalo to Martins Creek either on the EL five car rate of 40¢ per cwt. (EL Tariff No. 146, ICC 174) or by exempt truck at 22¢ per bushel or 37¢ per cwt. (See Exhibit 1 ). During the period from May 3, 1973, to October 12, 1973, ConAgra moved 125 cars from Buffalo to Martins Creek under the EL five car rate of 40¢ per cwt. and 301 trucks at 33¢ to 37¢ per cwt. This works out to 64% of our traffic via lake rail at a total cost of 71.67¢ per cwt. and 36% via truck at total cost of about 68.67¢ per cwt. or less. Thus the proposed rate of 72-1/4¢ per cwt. during open navigation season is not even as low as ConAgra's existing transportation costs.

During the winter months when navigation is closed on the lakes the proposed rate is 88¢. This is exactly equal to the Buffalo unit train rate of 43¢ per cwt. (Soo Line Tariff 526-I, ICC 7755) plus 5¢ per cwt. elevation and transfer at Buffalo plus the EL five car rate of 40¢ per cwt. to Martins

Creek (EL Freight Tariff 146, ICC 174).

From the foregoing it is clear that the imaginative arithmetic exercises of protestants have no relevance to the realities of the situation. Clearly, there is no rate reduction involved here. All that is proposed is an all rail rate at or above the level of lake/rail and lake/truck movement presently available to and being utilized by ConAgra.

Protestants' apprehensions of substantial diversion are also totally lacking in merit. As the lake carriers concede, they currently handle some 60,000,000 bushels of domestic grain. Of this amount Buffalo handles 96.5% or in excess of 58 million bushels. Even if ConAgra shifted all of its traffic from lake/truck and lake/rail to through rail movement under the proposed rate the net loss to the lake carriers would be about 3.5 million bushels or only about 6% of their total. Sharing 6% of available traffic with the railroads can hardly result in the total collapse of the entire Great Lakes Fleet as predicted by the lake carriers.

As for the port of Buffalo, the bypassing of that port by any significant amount of grain traffic is probably the best thing that could happen to the consuming public. As so often happens when a single entity or locale obtains a monopoly position, the port of Buffalo has developed a complacency and lethargy which has reduced its railroad terminals to among the worst run terminals in the country. The chronic delays which invariably occur in handling grain at Buffalo, which would be eliminated under the proposed through rate, are undoubtedly well known to the Commission through numerous car service complaints. Elimination of those delays and the costs associated with them are alone sufficient reason to justify approval of the proposed rate.

It comes with particularly ill grace for the lake carriers to suggest that the proposed rate would tend to be anticompetitive. At the present time they have no competition for ConAgra's traffic and the proposed rate would merely provide them with some. Thus, a healthy competitive situation would be created rather than eliminated by the proposed rate. The speciousness of the attack on the multiple trainload requirement is readily demonstrated by reference to the facts. The amount of grain which would be handled in each trainload movement under the proposed rate is 165,000 bushels. Three trainloads would therefore involve movement of a total of 495,000 bushels. One shipload of wheat in a typical size lake vessel employed in such service is approximately 400,000 bushels. Thus, under the proposed rate ConAgra would be no more "locked in" to rail movement than it would be "locked in" to lake movement by booking even a single vessel for shipment from Duluth/Superior to Buffalo.

The lake carriers, in apparent recognition of total lack of merit in their opposition to the proposed rate have also tried to suggest that it is somehow violative of Section 3(4) of the Act as that section has been construed in Arrow Transportation Co. v. United States, 176 F.Supp. 411, affirmed, 361 U.S. 353 (1960). The short answer to this argument is that Section 3(4) was never intended to provide connecting water carriers with a virtual veto power over through rail rates as these protestants suggest. The obvious purpose of Section 3(4) as is apparent from its plain language and the many cases in which it has been construed, is simply to require rail carriers to afford the same treatment to actual or potential water connections as they provide to rail connections. There is, however, simply no requirement that rail carriers actively solicit participation by potential water carrier connections as a prerequisite to establishment of through rail rates. The record is devoid of even a suggestion that protestant water carriers have asked to participate in the proposed rate. Furthermore, the fact that EL presently handles ex-water traffic from Buffalo to Martins Creek at competitive rates creates a strong presumption that, if the water carrier protestants did ask for an opportunity to participate in these rates, it would be afforded to them. However, until they make some showing that they have requested and been denied participation, Section 3(4) provides no justification for denying rail respondents the right to make competitive, and otherwise completely lawful, rates such as the unit train rate which is the subject of this proceeding.

The lake carriers, in apparent recognition of the weakness of their section 3(4) argument advise the Commission at pages 20-21 of their protest that the recent decision in Lake Carriers' Association, et al. v. The New York Central Railroad, et al., 343 I.C.C. 491 (1973) has no validity because the lake carriers intend to appeal it. Such presumptuousness betrays a recognition even by protestants that their section 3(4) argument, which attempts to place upon that section an interpretation far beyond that placed upon it by the Commission in its most recent decision in point, is totally lacking in merit. Until such time as the lake carriers do appeal the Commission's decision and succeed in having it reversed, it remains the law by which the Board must be guided in its determination of this controversy.

In summary, the lake carriers and the Buffalo port interests have not presented a single factor which would justify their being permitted to misuse the Commission's suspension procedures to perpetuate their monopoly for another seven months.

## V

## REPLY TO ALLEGATIONS OF PENN CENTRAL

ConAgra, quite frankly, is at somewhat of a loss as to why Penn Central has seen fit to dissipate its limited resources by participating in this proceeding. As we have already noted, what is involved here is a rate which would afford ConAgra the option of moving via Soo Line-EL traffic which is now moving via lake carrier-EL. Obviously, there is no way that this shift in routing could conceivably affect Penn Central.

Penn Central's suggestion that the proposed rate would force it to lower its rates on flour also ignores the relevant facts. As previously noted, ConAgra's present laid down cost of wheat at Martins Creek is 71.67¢ per cwt. (i.e., 26.67¢ lake freight + 5¢ elevation and transfer at Buffalo + 40¢ rail cost). Under the proposed rate of 72-1/4¢ per cwt. ConAgra will actually be paying more than that. Therefore, the allegation that this proposed rate could somehow require Penn Central to reduce its flour rates is patently absurd.

Although the specter of Penn Central's desperate financial situation and imminent demise always makes exciting reading, the Commission should not be diverted from the foregoing compelling facts by such ad hominem representations. In this connection it should perhaps be noted that Penn Central was asked to participate in the proposed rate, which rail respondents have shown to be fully compensatory and, in fact, quite profitable, but chose not to. It would therefore appear that Penn Central could better devote its efforts to the type of progressive rate making represented by the proposed rate than to the misinformed opposition of the type represented by its protest.

## IV

## SUMMARY AND CONCLUSION

The proposed rate involves no reduction below ConAgra's present cost of transporting grain to its Martins Creek mill. During the Great Lakes Navigation season it is slightly higher than the cost presently incurred in bringing grain across the Great Lakes to Buffalo and thence to Martins Creek by truck or rail. During the period when navigation on the Great Lakes is closed the proposed rate is exactly equal to the cost of moving grain from Minneapolis/St. Paul or Duluth/Superior to Buffalo via the Soo Line Buffalo unit train rate and thence to Martins Creek via truck or via the EL five car rate. No competitive relations in the milling industry are disturbed. The present monopolistic grip of the lake carriers on the flow of grain into the eastern markets is loosened slightly by affording Soo Line an opportunity to compete for ConAgra's traffic. Wasteful and needless handling at congested transfer facilities at Buffalo will be eliminated. It results in maximum efficient utilization of railroad equipment.

The net result of the proposed rate is to promote healthy competition in the public interest with no offseting injury to anyone. Clearly, protestants have not made out a case for suspension of the proposed rate.

Respectfully submitted,

CONAGRA, INCORPORATED

By ______________________
Donald Macleay
Peter A. Greene
Its Attorneys

Of Counsel:

MACLEAY, LYNCH, BERNHARD & GREGG
1625 K Street, N. W.
Washington, D. C. 20006

Dated: October 25, 1973

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon counsel for all parties of record via first class mail, postage prepaid, this 25th day of October, 1973.

______________________
Peter A. Greene

**LOVATT AND COMPANY, INC.**
Grain & Feed Merchants & Brokers
40 E. BUTLER AVENUE • AMBLER, PA. 19002
(215) 643-5630 • 5631 • CH 2-3538

220a

No. 10298

INVOICE DATE 9-6-73
OUR ORDER NO.
YOUR ORDER NO.
TERMS F.O.B.
SALESMAN
SHIPPED VIA

Con-agra, Inc.
Martins Creek, Pa. 18063

PED TO

PPD. OR COLL.

| QUANTITY | DESCRIPTION | PRICE | AMOUNT |
|---|---|---|---|
| | Freight on 16,101.67 bus. @.22 per bu. | | $3542.37 |

| DATE | # | WT. |
|---|---|---|
| 8-20 | 0162 | 46000 ✓ |
| 8-21 | 203 | 45580 ✓ |
| | 210 | 46380 ✓ |
| | 211 | 46660 ✓ |
| | 275 | 44360 ✓ |
| 8-24 | 302 | 44980 ✓ |
| | 305 | 45440 ✓ |
| | 308 | 44620 ✓ |
| ~~8x8x~~ | 310 | 46760 ✓ |
| 8-31 | 451 | 46800 ✓ |
| | 454 | 46900 ✓ |

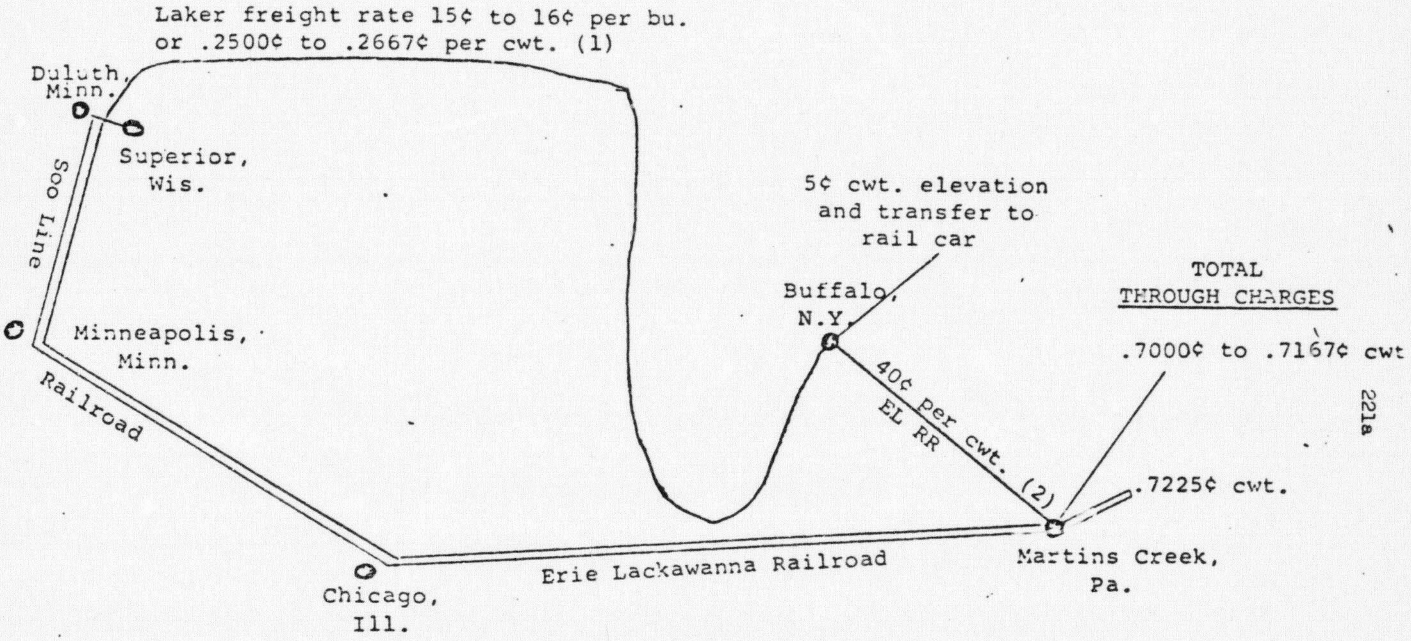
| DATE | # | WT. |
|---|---|---|
| 8-27 | 348 | 46140 ✓ |
| | 350 | 45440 ✓ |
| | 352 | 44880 ✓ |
| | 355 | 42140 ✓ |
| 8-28 | 385 | 47620 ✓ |
| | 387 | 46600 ✓ |
| | 388 | 47480 ✓ |
| | 394 | 47960 ✓ |
| 8-29 | 413 | 47540 ✓ |
| | 419 | 45820 ✓ |

966100# =16101.67 bus.

400, REGENT FORMS, PENNSAUKEN, N. J. 08109

Exhibit 2

COST COMPARISONS OF PRESENT AND PROPOSED METHOD OF MOVING
WHEAT FROM DULUTH, SUPERIOR AND MINNEAPOLIS TO MARTINS CREEK


Laker freight rate 15¢ to 16¢ per bu.
or .2500¢ to .2667¢ per cwt. (1)
Duluth, Minn.
Superior, Wis.
Soo Line
Minneapolis, Minn.
Railroad
5¢ cwt. elevation and transfer to rail car
Buffalo, N.Y.
TOTAL THROUGH CHARGES
.7000¢ to .7167¢ cwt
40¢ per cwt. (2)
EL RR
.7225¢ cwt.
Martins Creek, Pa.
Chicago, Ill.
Erie Lackawanna Railroad

———— Represents present method of moving wheat via laker from Duluth-Superior to Buffalo and transfer to rail car at Buffalo for rail movement to Martins Creek.

════ Represents proposed all rail movement via Soo Line-Chicago-EL under rate of .7225¢ per cwt. published in Soo Line Tariff 543-B, ICC 7837.

(1) See Exhibit No. 2A for verification of average laker rates.

(2) Tariff authority Item 44810 of Erie Lackawanna Tariff No. 146, ICC 174.

Exhibit 2A

MAXWELL HARRIS COMPANY, INC.
Chartering Brokers
FOREIGN · · COASTWISE

TELETYPEWRITERS
TWX 710-581-4747
RCA 223230
CABLE ADDRESS
"HARMAXSHIP"

19 RECTOR STREET
NEW YORK, N. Y. 10006
TEL. 212 - 422-1885

October 12, 1973

Mr. Donald Stone
General Traffic Manager
ConAgra, Inc.
500 Kiewit Plaza
Omaha, Nebraska 68131

Dear Don:

Confirming our conversation, freight from Duluth to Buffalo over this 1973 has been going between 15/16¢ per bushel and there is still some space available.

Very truly yours,

MAXWELL HARRIS COMPANY, INC.

Donald E. Harris

DEH/hs

## COMPETITIVE RELATIONSHIP OF MARTINS CREEK, PENNSYLVANIA VS. BUFFALO, NEW YORK ON WHEAT ORIGINATED AT DULUTH, MINNESOTA AND MILLED AT THOSE POINTS INTO WHEAT FLOUR AND SHIPPED TO DESTINATIONS SPECIFIED VIA PRIVATE TRUCK WHEN FROM MARTINS CREEK AND VIA SINGLE CAR RAIL RATES WHEN FROM BUFFALO

### TO PHILADELPHIA, PENNSYLVANIA

| FROM MARTINS CREEK, PA. | FROM BUFFALO, N. Y. |
|---|---|
| $ .7225 cwt. (See Note 1) | $.3000 cwt. (See Note 3) |
| .0200 cwt. (See Note 2) | .5800 cwt. (See Note 4) |
| .2900 cwt. Trucking Cost of Flour (See Exhibit 3A ) | |
| $1.0325 cwt. Total Cost | $.8800 cwt. Total Cost |

### TO BROOKLYN, NEW YORK

| FROM MARTINS CREEK, PA. | FROM BUFFALO, N. Y. |
|---|---|
| $ .7225 cwt. (See Note 1) | $.3000 cwt. (See Note 3) |
| .0200 cwt. (See Note 2) | .5800 cwt. (See Note 4) |
| .3300 cwt. Trucking Cost of Flour (See Exhibit 3B ) | |
| $1.0725 cwt. Total Cost | $.8800 cwt. Total Cost |

### TO HACKENSACK, NEW JERSEY

| FROM MARTINS CREEK PA. | FROM BUFFALO, N. Y. |
|---|---|
| $ .7225 cwt. (See Note 1) | $.3000 cwt. (See Note 3) |
| .0200 cwt. (See Note 2) | .5800 cwt. (See Note 4) |
| .3000 cwt. Trucking Cost of Flour (See Exhibit 3C ) | |
| $1.0425 cwt. Total Cost | $.8800 cwt. Total Cost |

### TO JAMAICA, NEW YORK

| FROM MARTINS CREEK, PA. | FROM BUFFALO, N. Y. |
|---|---|
| $ .7225 cwt. (See Note 1) | $.3000 cwt. (See Note 3) |
| .0200 cwt. (See Note 2) | .5800 cwt. (See Note 4) |
| .3400 cwt. Trucking Cost of Flour (See Exhibit 3D) | |
| $1.0825 cwt. Total Cost | $.8800 cwt. Total Cost |

NOTE 1 - Rate on wheat from Duluth to Martins Creek "B" plant. Tariff authority Soo Line Tariff 543-B ICC No. 7837

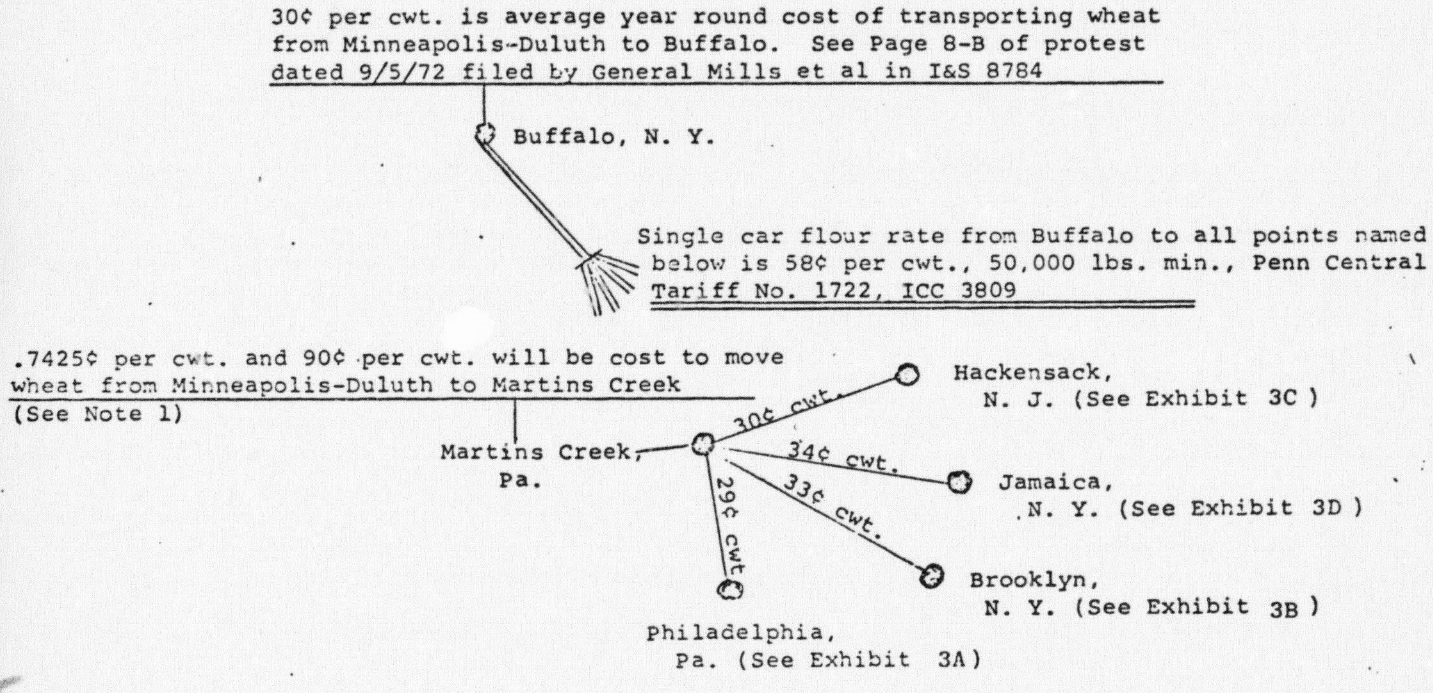
NOTE 2 - Rate represents private trucking cost on wheat from Martins Creek "B" on rail to Martins Creek "A" which isn't on rail.

NOTE 3 - Buffalo millers have previously stated that summer wheat freight costs using lakers and winter freight costs using rail trainload rates from Duluth produces year round average of 30¢ cwt. (See Page 8-B of Petition for Suspension dated 9/5/72 in I&S Docket 8784 filed on behalf of protesting flour millers group, General Mills, Inc. et al.

NOTE 4 - Single car wheat flour rate, minimum 50,000 lbs. per car, published in Penn Central Transportation Co. Tariff No. 1722, ICC No. 3809. Stated rate is on Ex Parte 299 level, ICC No. C-984.

Exhibit 3,page 2

TRANSPORTATION COST COMPARISONS OF BUFFALO VERSUS MARTINS CREEK USING RAIL FROM BUFFALO AND PRIVATE TRUCK FROM MARTINS CREEK TO REACH REPRESENTATIVE FLOUR MARKETS. TOTAL OF INBOUND AND OUTBOUND RATES LISTED PROVIDES OVERALL COMPARISON WHICH CLEARLY INDICATES ADVANTAGES ENJOYED BY BUFFALO


30¢ per cwt. is average year round cost of transporting wheat from Minneapolis-Duluth to Buffalo. See Page 8-B of protest dated 9/5/72 filed by General Mills et al in I&S 8784

Single car flour rate from Buffalo to all points named below is 58¢ per cwt., 50,000 lbs. min., Penn Central Tariff No. 1722, ICC 3809

.7425¢ per cwt. and 90¢ per cwt. will be cost to move wheat from Minneapolis-Duluth to Martins Creek (See Note 1)

Buffalo, N. Y.
Martins Creek, Pa.
30¢ cwt.
34¢ cwt.
33¢ cwt.
29¢ cwt
Hackensack, N. J. (See Exhibit 3C )
Jamaica, N. Y. (See Exhibit 3D )
Brooklyn, N. Y. (See Exhibit 3B )
Philadelphia, Pa. (See Exhibit 3A)

Note 1 - Rates reflect those here protested (Soo Line Tariff 543-B, ICC 7837) + .02¢ per cwt. for private trucking cost to move wheat from Martins Creek "B" plant on rail to Martins Creek "A" plant not on rail. Flour is milled and shipped by truck from Plant "A".

# RATE COMPUTATION SHEET

PRODUCT BULK FLOUR

ADDRESS Philadelphia, Pa.

ORIGIN: MCA

| | | |
|---|---|---|
| MILES | 150 | See Note 1 |
| LABOR HRS. | 7 | See Note 2 |
| CWT | 450 | |
| FIXED COST | 60.88 | See Note 3 |
| MAINT. COST | 12.00 | See Note 4 |
| FUEL COST | 9.00 | See Note 5 |
| BULK TRUCK CLNG. | 6.45 | See Note 6 |
| DRIVER LABOR | 34.76 | See Note 7 |
| HELPER LABOR | | |
| OUTSIDE LABOR | | |
| TOLLS | 8.00 | See Note 8 |
| MEALS | | |
| LODGING | | |
| MISCELLANEOUS | | |
| TOTAL COST | 131.09 | See Note 9 |
| RATE/CWT | .29 | See Note 10 |

NOTES

1 - Actual round trip highway mileage from Martins Creek, Pa.

2 - Labor hours stated based on actual experience. Figure includes all driving time and time consumed in unloading bulk trailer.

3 - Actual calculation of equipment leasing costs of $48.16 daily for tractor and pneumatic trailer plus insurance and license $3.72 daily, plus $1.00 for truck washing plus $1.00 for shop equipment depreciation plus $7.00 for administration and supervision.

4 - Based on 6¢ per mile for tractor and 2¢ per mile on trailer.

5 - Based on average of 4.8 miles per gallon and fuel cost of 29¢ per gallon.

6 - Based on our actual experience throughout U.S. of cleaning each bulk trailer interiorly after each load.

7 - Based on paying our drivers 16¢ per continuous mile plus $3.68 per hour for time spent preparing trailer for unloading, actual unloading process and preparation to return to Martins Creek, plus 20% for fringe benefits. Total cost reflects our actual experience.

8 - Based on actual freeway tolls paid by ConAgra in trucking flour to this destination.

9 - Figure represents sum total of expenses actually incurred by ConAgra.

10 - Figure represents total cost divided by average payload of 45,000 lbs. per shipment to arrive at per cwt. cost.

# RATE COMPUTATION SHEET

226a

PRODUCT BULK FLOUR

ADDRESS BROOKLYN, N.Y.

ORIGIN: MCA

| | | |
|---|---|---|
| MILES | 176 | See Note 1 |
| LABOR HRS. | 8 | See Note 2 |
| CWT | 450 | |
| FIXED COST | 60.88 | See Note 3 |
| MAINT. COST | 14.08 | See Note 4 |
| FUEL COST | 10.56 | See Note 5 |
| BULK TRUCK CLNG. | 6.45 | See Note 6 |
| DRIVER LABOR | 42.63 | See Note 7 |
| HELPER LABOR | | |
| OUTSIDE LABOR | | |
| TOLLS | 14.00 | See Note 8 |
| MEALS | 1.25 | |
| LODGING | | |
| MISCELLANEOUS | | |
| TOTAL COST | 149.85 | See Note 9 |
| RATE/CWT | .33 | See Note 10 |

NOTES

1 - Actual round trip highway mileage from Martins Creek, Pa.

2 - Labor hours stated based on actual experience. Figure includes all driving time and time consumed in unloading bulk trailer.

3 - Actual calculation of equipment leasing costs of $48.16 daily for tractor and pneumatic trailer plus insurance and license $3.72 daily, plus $1.00 for truck washing plus $1.00 for shop equipment depreciation plus $7.00 for administration and supervision.

4 - Based on 6¢ per mile for tractor and 2¢ per mile on trailer.

5 - Based on average of 4.8 miles per gallon and fuel cost of 29¢ per gallon.

6 - Based on our actual experience throughout U.S. of cleaning each bulk trailer interiorly after each load.

7 - Based on paying our drivers 16¢ per continuous mile plus $3.58 per hour for time spent preparing trailer for unloading, actual unloading process and preparation to return to Martins Creek, plus 20% for fringe benefits. Total cost reflects our actual experience.

8 - Based on actual freeway tolls paid by ConAgra in trucking flour to this destination.

9 - Figure represents sum total of expenses actually incurred by ConAgra.

10 - Figure represents total cost divided by average payload of 45,000 lbs. per shipment to arrive at per cwt. cost.

Exhibit 3C

# RATE COMPUTATION SHEET

PRODUCT BULK FLOUR

ADDRESS HACKENSACK, N.J.

ORIGIN: MCA

| | | |
|---|---|---|
| MILES | 170 | See Note 1 |
| LABOR HRS. | 7½ | See Note 2 |
| CWT | 450 | |
| FIXED COST | 60.88 | See Note 3 |
| MAINT. COST | 13.60 | See Note 4 |
| FUEL COST | 10.20 | See Note 5 |
| BULK TRUCK CLNG. | 6.45 | See Note 6 |
| DRIVER LABOR | 41.48 | See Note 7 |
| HELPER LABOR | | |
| OUTSIDE LABOR | | |
| TOLLS | 2.50 | See Note 8 |
| MEALS | | |
| LODGING | | |
| MISCELLANEOUS | | |
| TOTAL COST | 135.11 | See Note 9 |
| RATE/CWT | .30 | See Note 10 |

NOTES

1 - Actual round trip highway mileage from Martins Creek, Pa.

2 - Labor hours stated based on actual experience. Figure includes all driving time and time consumed in unloading bulk trailer.

3 - Actual calculation of equipment leasing costs of $48.16 daily for tractor and pneumatic trailer plus insurance and license $3.72 daily, plus $1.00 for truck washing plus $1.00 for shop equipment depreciation plus $7.00 for administration and supervision.

4 - Based on 6¢ per mile for tractor and 2¢ per mile on trailer.

5 - Based on average of 4.8 miles per gallon and fuel cost of 29¢ per gallon.

6 - Based on our actual experience throughout U.S. of cleaning each bulk trailer interiorly after each load.

7 - Based on paying our drivers 16¢ per continuous mile plus $3.68 per hour for time spent preparing trailer for unloading, actual unloading process and preparation to return to Martins Creek, plus 20% for fringe benefits. Total cost reflects our actual experience.

8 - Based on actual freeway tolls paid by ConAgra in trucking flour to this destination.

9 - Figure represents sum total of expenses actually incurred by ConAgra.

10 - Figure represents total cost divided by average payload of 45,000 lbs. per shipment to arrive at per cwt. cost.

Exhibit 3D

# RATE COMPUTATION SHEET

PRODUCT BULK FLOUR

ADDRESS Jamaica, N.Y.

ORIGIN: MCA

| | | |
|---|---|---|
| MILES | 188 | See Note 1 |
| LABOR HRS. | 8 | See Note 2 |
| CWT | 450 | |
| FIXED COST | 60.88 | See Note 3 |
| MAINT. COST | 15.04 | See Note 4 |
| FUEL COST | 11.28 | See Note 5 |
| BULK TRUCK CLNG. | 6.45 | See Note 6 |
| DRIVER LABOR | 44.94 | See Note 7 |
| HELPER LABOR | | |
| OUTSIDE LABOR | | |
| TOLLS | 14.00 | See Note 8 |
| MEALS | 1.25 | |
| LODGING | | |
| MISCELLANEOUS | | |
| TOTAL COST | 153.84 | See Note 9 |
| RATE/CWT | .34 | See Note 10 |

NOTES

1 - Actual round trip highway mileage from Martins Creek, Pa.

2 - Labor hours stated based on actual experience. Figure includes all driving time and time consumed in unloading bulk trailer.

3 - Actual calculation of equipment leasing costs of $48.16 daily for tractor and pneumatic trailer plus insurance and license $3.72 daily, plus $1.00 for truck washing plus $1.00 for shop equipment depreciation plus $7.00 for administration and supervision.

4 - Based on 6¢ per mile for tractor and 2¢ per mile on trailer.

5 - Based on average of 4.8 miles per gallon and fuel cost of 29¢ per gallon.

6 - Based on our actual experience throughout U.S. of cleaning each bulk trailer interiorly after each load.

7 - Based on paying our drivers 16¢ per continuous mile plus $3.68 per hour for time spent preparing trailer for unloading, actual unloading process and preparation to return to Martins Creek, plus 20% for fringe benefits. Total cost reflects our actual experience.

8 - Based on actual freeway tolls paid by ConAgra in trucking flour to this destination.

9 - Figure represents sum total of expenses actually incurred by ConAgra.

10 - Figure represents total cost divided by average payload of 45,000 lbs. per shipment to arrive at per cwt. cost.

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Before The

INTERSTATE COMMERCE COMMISSION

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# RESPONDENTS' REPLY TO PROTESTS AND PETITIONS FOR SUSPENSION

## Suspension No. 59923

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EFFECTIVE DATE: November 1, 1973

TARIFF REFERENCES: Soo Line Freight Tariff 543-B
ICC 7837

COMMODITY: Wheat in bulk in covered hopper cars having capacity of 4,500 cubic feet and over. Minimum weight per movement 5,000 tons. Aggregate minimum weight 15,000 tons per shipment.

FROM: Duluth, Minneapolis, Minnesota Transfer, St. Paul, Minnesota and Superior, Wisconsin.

TO: Martins Creek, Pennsylvania.

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COME NOW the Soo Line Railroad Company and Thomas F. Patton and Ralph S. Tyler, Jr., Trustees of the Property of the Erie Lackawanna Railway Company, hereinafter referred to collectively as Respondents and individually as "Soo Line" and "Erie Lackawanna", and file this reply to protests and petitions for suspension of a reduced unit train rate on wheat from the Twin Ports and Twin Cities to Martins Creek, Pennsylvania. The list of protestants is set forth in Appendix A attached hereto.

The protested rate is subject to a minimum weight limitation of 190,000 pounds per car, an aggregate minimum weight of 5,000 tons per movement (train) and an aggregate of three consecutive train movements per shipment. Normal terminal and transfer services, such as weighing, inspection, diversion or reconsignment will not apply in connection with this rate. In lieu of standard demurrage provisions, the rate is subject to 24 hours free time at origin and 36 hours free time at destination. Beyond this free time a special detention charge of $475.00 per train will be assessed at origin for each 24 hours or fraction thereof, and a charge of $9.50 per car will be assessed at destination for each 24 hours or fraction thereof.

The level of the proposed rate during the period of open navigation on the Great Lakes (April 1-December 14) is 72.25¢ per cwt. During the period of closed navigation (December 15-March 31) the rate level will be 88¢ per cwt.

Pursuant to Special Permission Number 74-1051, the proposed rate has been made subject to a modified destination Rule 27 provision. The same permission waives the provisions of Tariff Circular 20 Rules 4(i) and 7 insofar as Items 130 and 132 of Soo Line Tariff 543-B, ICC 7837 are concerned.

## I

## Economic Background of Grain Transportation From North Central to Eastern Region of the United States

Historically, Buffalo, New York, has been the largest flour milling complex in the United States. Its predominant position in the flour milling market has increased in importance in recent years. This position is the result of two major advantages. First, the Buffalo flour mills, unlike many of their principal competitors, are located adjacent to the major flour consuming market in the United States; namely, the North Atlantic states. Second, geographic location permits Buffalo mills to draw wheat from all of the principal producing areas. The two primary areas and types of wheat are (1) hard red winter wheat produced in the states of Texas, Oklahoma, Kansas, Nebraska and Colorado and (2) hard northern spring wheat produced in the states of Minnesota, North Dakota, South Dakota and Montana. Wheat from the former area generally moves through the primary markets of Kansas City or Omaha. Hard northern spring wheat for milling at Buffalo moves through the primary market at Duluth, Minn. Historically, spring wheat purchased by Buffalo millers has moved beyond Duluth by water transportation on the Great Lakes. This transportation is exempt from Interstate Commerce Commission regulation under the bulk commodity exemption clause contained in Section 303, Part III of the Interstate Commerce Act. Prices for water transportation vary and fluctuate according to relative supply of equipment and demand for transportation. The availability of this unregulated water transportation is the most important economic factor explaining Buffalo's position as the nation's ranking milling center. The milling capacity at Buffalo and the enormity of the eastern spring wheat flour market served by Buffalo result in a tremendous movement of spring wheat via lake vessels from the Twin Ports to Buffalo. As shown by Table I below, approximately 47.5 million bushels of wheat move annually from the Twin Ports to flour mills located on the Great Lakes via water transportation. Table I also demonstrates the extent to which the Buffalo mills dominate the market insofar as flour produced from spring wheat is concerned.

Table I

LAKE SHIPMENTS OF DOMESTIC WHEAT FROM DULUTH-SUPERIOR FOR YEARS SHOWN (in bushels)

| YEAR | BUFFALO TONNAGE | TOTAL TONNAGE |
|---|---|---|
| 1965 | 44,192,000 | 46,979,000 |
| 1966 | 51,826,000 | 57,821,000 |
| 1967 | 36,736,000 | 40,810,000 |
| 1968 | 40,730,000 | 44,151,000 |
| 1969 | 44,072,000 | 48,310,000 |
| 1970 | 43,814,000 | 47,572,000 |
| 1971 | 47,082,000 | 47,714,000 |
| 1972 | 45,058,000 | 45,322,000 |

Source: DULUTH BOARD OF TRADE ANNUAL REPORTS

Prior to 1964 exempt water transportation charges were at such a level as to preclude rail carriers from participation in the transportation of wheat moving from Duluth to Buffalo. Rail carriers were a standby mode, occasionally moving nominal tonnages during the winter months but only when winter time demand for spring wheat exceeded prior estimates and flour mills could not await availability of water transportation commencing in April of each year.

In December, 1963, the single car all-rail wheat freight rate from Duluth to Buffalo was 72-1/2¢ per cwt., approximately three times higher than the average charge assessed by the exempt water carrier for transporting wheat between the same points.

In January, 1964, respondent railroads herein and others attempted to compete with the unregulated water carriers for a small portion of the wheat which historically had moved from Duluth to Buffalo via water. This competitive effort involved a publication of a unit train rate of 33-1/2¢ per cwt., approximately 54 percent lower than the then existing single car rate.

Before publishing the Buffalo unit train rate, the railroads made a thorough evaluation of total costs incidental to the transportation of wheat by water and they determined that a small portion of the Great Lakes tonnage could be diverted to rail movement, displacing some of the wheat which the millers were required to store in Buffalo elevators during the season of each year when the Great Lakes were frozen over. The railroads realized at that time that they could not compete effectively with the unregulated water carriers for transportation of grain moving from Duluth to Buffalo during the navigation season.

Effective January 8, 1964, the Soo Line and the Pennsylvania Railroad Company published the unit train rate referred to above in Soo Line Freight Tariff 526-A, ICC 7629. This rate was the subject of numerous suspension petitions filed by many of the interests seeking suspension on the instant rate, and others, which raised most of the issues of unlawfulness which have been raised again in such shrill tones by petitioners herein.* In the face of these protests the Commission refused to suspend the Duluth-Buffalo unit train rate and in Wheat, in Multiple Car Shipments, Minn. & Wis. to Buffalo, Docket No. 34381 (unreported) the Commission found the Duluth-Buffalo unit train rate was "just, reasonable and not otherwise unlawful."

The Duluth-Buffalo unit train rate accomplished, in part, its limited purpose of displacing a portion of the winter storage wheat which had previously moved over the Great Lakes. Thus, to illustrate, during the years 1969-1973 an approximate average of 6.7 million bushels of wheat moved annually under the unit train rate. This volume was slightly less than the amount of wheat moved over the Great Lakes and held in winter storage during this three-year period.

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*It was vigorously and enthusiastically supported by most of the Buffalo millers and both of Penn Central's predecessors, the principal protestants to the subject rate.

The Buffalo unit train rate fulfilled none of the dire predictions of those seeking its suspension that its publication would destroy the shipping capacity of Great Lakes carriers, would cause widespread unemployment and would entirely disrupt the eastern territory marketing of flour produced in eastern and central United States regions. The reasons these predictions failed to materialize are highly significant in this case since they were based upon the same totally false premises which undergird the identical false predictions of disaster which petitioners herein rely upon in seeking suspension of the Buffalo-Martins Creek unit train rate.

The uncontrovertable facts are:

(1) The Buffalo unit train rate has moved an average of 6.7 million bushels of grain which would otherwise move by water, approximately 0.690% of the 965.1 million bushels of grain moving annually over the Great Lakes. (See Lake Carriers' Association Suspension Petition, page 2.) The Martins Creek unit train rate will move an additional 3.5 million bushels of wheat which would

otherwise move in unregulated water-truck service. Again, this represents approximately 0.362% of the total grain tonnage moving annually over the Great Lakes. In the face of these facts, the suggestion of unregulated water carriers that the Martins Creek rate will cripple their capacity to move grain and other exempt commodities and that thousands of Buffalo based laborers will lose employment* is groundless.

(2) Because the Buffalo unit train rate merely met the alternative cost available to Buffalo mills by unregulated carriage there is no way it could have affected the market price of flour laid down in New York, Philadelphia and other large eastern population centers. The Buffalo millers' ability to market flour at a given price level was determined primarily by their water transportation costs and the sole question raised by publication of the Duluth-Buffalo unit train rate was whether ornot a small portion of that traffic would move pursuant to a regulated unit train rate, reflecting approximately the same costs as those involved in lake transportation and winter storage of Duluth wheat.

The same situation exists with respect to the Martins Creek rate published to move Conagra's wheat traffic. Conagra can presently move wheat from Duluth to Martins Creek at a cost of

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*See Exhibit D attached to Niagara Frontier Transportation Authority protest.

72.25¢ per cwt. during the Great Lakes navigation season, by using exempt water carriage from Duluth to Buffalo and the five car 40¢ per cwt. rate published by Erie Lackawanna for the Buffalo-Martins Creek movement. During the balance of the year, Conagra can move wheat from Duluth or Minneapolis to Martins Creek at a cost of 88¢ per cwt. in a through rail movement via Buffalo, by combining the Buffalo unit train rate with the five car rate from Buffalo to Martins Creek.*

The detailed facts documenting the accuracy of the foregoing cost data are set forth in Conagra's reply and will not be reproduced herein. It is sufficient for Respondents to note that they must meet Conagra's alternative transportation costs if they hope to handle Conagra's business. The proposed rate is barely low enough to accomplish this objective. However, as this reply will show, it is high enough to make a very substantial contribution to the profitability of both Soo Line and Erie Lackawanna.

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*Conagra's costs are slightly below those produced by the proposed rate if the Buffalo-Sandts Eddy movement is handled by exempt motor carriers.

## II

## BACKGROUND OF PROPOSED RATES

By publication scheduled to become effective September 16, 1972, these respondents published an *annual volume* (100,000 tons) unit train rate on wheat at a 62.5¢ per cwt. level between the origins and destination here involved. Following the filing of protests to the 62.5¢ rate by most of the parties protesting the rate now proposed, and others, and responses thereto being filed by respondents and Conagra, *the Board of Suspension voted not to suspend or investigate said rate*.

Subsequently, the Suspension Board's decision was reversed by Division 2 in *Wheat, Annual Volume Rate, Minn. & Wisc. to Martins Creek, Pa.*, I&S Docket No. 8784. Shortly thereafter, for reasons set forth in Respondents' Reply to Suspension Petitions and in their Petition for Reconsideration, the proposed rate was withdrawn and the investigation proceeding was discontinued.

*Respondents are convinced that the 62.5¢ rate was suspended by the Commission for only one reason, namely, the annual volume requirement*. Unknown to Respondents on September 15, 1972, was the fact that the full Commission only eight days earlier had decided,* in Great Lakes Shipowners Assn. v. Chicago & N.W. Ry., 341 ICC 272, that annual volume rates were considered to be unlawful per se any time competition between carriers was involved (see 341 ICC 284).

However, in the Great Lakes case, the Commission carefully noted:

> Our conclusion that the annual-volume condition herein should be eliminated should be placed in its proper perspective. We have found nothing wrong with the concept of unit-train pricing which is so essential to the rail and coal industry, the electric utility market and the millions of customers which they serve. This proceeding need have no adverse effect on such unit-train arrangements since the annual-volume condition has not been shown essential to the unit-train operation or pricing technique. The level of the unit-train is the important consideration and it is apparently too low for the water carriers to compete, since on this record their rate offers were not accepted on two occasions since the unit-train rate of $1.56 became effective. Thus, there should be no impact on the rate levels, the minima, the unit-train service or the tonnage transported as a direct result of the elimination of the annual-volume condition. The only thing being condemned is the condition and related matters.

In the Spring and Summer of 1973, respondents and Conagra resumed discussions looking toward the publication of a new unit-train rate which would (1) be attractive to both respondents and Conagra and (2) would eliminate the one feature of the 62.5¢

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*This case was decided by the full Commission September 7, 1972, but the decision was not served until September 27, 1972.

rate which respondents believe the Commission, Division 2, found objectionable in I&S Docket 8784.

After tentative agreement to the rate levels and principal provisions was reached by respondents and Conagra, Soo Line and Erie advised the principal Buffalo mills of what was contemplated. Subsequently, as a result of discussion between respondents and these Buffalo mills (who are all protestants herein), the railroads and Conagra agreed to the following revisions of the proposed publication which were requested by the Buffalo mills:

1. Increasing the rate applicable during the period of open navigation from 71.25¢ per cwt. to 72.25¢ per cwt.

2. Extending the application of the 88¢ closed navigation rate from January 1, 1974, through March 31, 1974, to December 15, 1973, through March 31, 1974.

3. Compromising the Buffalo millers' request for an April 15, 1974, expiration date to provide a September 15, 1974 termination date, which coincides with the expiration date of the Buffalo Unit Grain Train tariff.

4. Insuring that the rate governing any movement would be the rate in effect on the date the movement originated at a Twin Cities or Twin Ports elevator.

Respondents rejected the Buffalo Mills' request that the origins for the new proposed rate be limited to Duluth-Superior but *in all other respects respondents and Conagra acceded to the requests for revisions of the proposed rate which were proposed by the Buffalo milling interests*.

Following established pre-publication procedures, the Western Trunk Line Committee circularized respondent Soo Line's rate proposal on August 29, 1973, as Application 21-9418. Many members of the grain trade receive copies of *all* grain rate proposals issued by the Committee, including the Chicago Board of Trade and the Buffalo mills. As with all other rate proposals, official notification was made through the Traffic Bulletin which published a synopsis of Application 21-9418 on September 8, 1973. This notice advised all parties having any interest in the proposed rate that they had until September 17, 1973, to voice their comments or objections. Respondents received three inquiries by parties who merely requested to be kept advised of the proceedings on this proposal. But no objections were received and no party requested a public hearing. On September 20, 1973, the Soo Line announcement to proceed with its publication was issued by the Western Trunk Line Committee and this was concurred in by the Erie Lackawanna on September 24,

1973. Tariff publication followed on September 28, 1973, with a statutory effective date of November 1, 1973.

## III

## SPECIFIC REPLIES TO PETITIONERS' ALLEGATIONS OF UNLAWFULNESS

Respondents have received copies of eight separate petitions requesting suspension of the proposed rate publication which were filed on behalf of the Buffalo mills, Penn Central Railroad, Great Lakes water carriers, and their employees, Kansas-Missouri River Mills and the Chicago Board of Trade. Collectively, these petitions allege the proposed rate violates Sections 1(5), 2, 3(1), 3(4), 4, 6, 15a(2), and the National Transportation Policy.

Allegations of several protestants that the proposed rate will permit Conagra to dominate the flour market throughout the North Central United States have been met by Conagra's Reply and will not be repeated in this pleading. We do note,however, that Conagra's Reply demonstrates in a convincing fashion that protestants' arguments relative to the marketing impact of the proposed rate are premised upon numerous false premises and should be rejected by the Commission as totally spurious.

Before commencing a point by point refutation of other allegations of unlawfulness contained in protestants' Petitions, respondents feel compelled to make the further threshold observation concerning the protests filed by the Buffalo mills and the Penn Central:

Virtually every argument which these protestants rely upon to demonstrate the alleged unlawfulness of the proposed rate could be made with equally telling effect to prove that the Buffalo unit train rate, which was published by Penn Central's predecessors for the benefit of the Buffalo mill protestants, is also unlawful. The Commission rejected all of those identical arguments, made by other protesting parties, when it found the Buffalo unit train rate to be lawful in ICC Docket 34381. It reached this conclusion on the basis of a record submitted and arguments advanced not only by respondent Soo Line but also by protesting Buffalo mills and Penn Central's predecessors.

## A. The Proposed Rate Will Produce A Minimum Annual Net Revenue Contribution Of $444,000 To Erie Lackawanna And Will Be Highly Profitable For Soo Line

The Buffalo mills assert, commencing at page 14 of their Protest, that "The protected tariff provisions would result in unwarranted and unlawful dissipation of the revenues of the Erie Lackawanna". This protestant, and others, shedding copious crocodile tears in the process, suggest the proposed rate will result "in subsidization by the bankrupt Erie of the prosperous Soo", that both respondents have been illicitly "enticed" or "seduced" by Conagra, etc. These protestants presume to protect respondents, especially Erie, from the folly of their ways by seeking suspension of the proposed rate.

(1) Respondent Erie responds to these reckless, demeaning and totally spurious allegations as follows:

The contention of protestants admittedly is based on the following assumptions: (1) that Erie Lackawanna is transporting 80 percent or more of the wheat movement from Buffalo to Martins Creek under its 40 cent five car rate*; (2) that Erie Lackawanna would transport no more than 80 percent of the wheat to Martins Creek under the proposed rate. Both of these assumptions, which we will show hereafter to be incorrect, are admitted by protestants to be the keystones to the calculations made by Mr. Bilz purporting to show that Erie Lackawanna will earn $72,240 less under its 65 percent division of the proposed unit train rate than it is presently receiving under the five-car rate applicable from Buffalo to Martins Creek (App. C to Protest of the Buffalo mills).

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*In the footnote at page 9 of the Protest of the Buffalo mills, it is stated that the 80 percent assumption was confirmed by Mr. Warren Barber, Assistant Vice President, Erie Lackawanna, on August 16, 1973, and also by independent sources. The "independent sources" are not identified. Also, Mr. Barber has no recollection of any confirmation of an 80 percent figure and knows of no basis for such an assumption. Obviously, reliance upon Mr. Barber for the 80 percent assumption is the result of a plain misunderstanding.

With respect to the first assumption, during the period May 3, 1973 (when Conagra made its first truck shipment of wheat from Buffalo to Martins Creek) to October 12, 1973, Conagra has moved 36 percent of its wheat by exempt motor truck and only 64 percent by rail. From May 3, 1973 to October 12, 1973 Conagra has moved over 300 truck loads and 125 rail carloads of wheat from Buffalo to Martins Creek (Conagra's Reply to Protests). Clearly, Conagra has found a cheaper mode than rail transportation for the movement of 36 percent of its wheat from Buffalo to Martins Creek. Moreover, Penn Central Transportation Company now has published a five-car rate of 40¢ per cwt. on wheat from Buffalo to Martins Creek, effective October 31, 1973, and by virtue of a reciprocal switching tariff will be able from that date to compete for wheat traffic from Buffalo to Martins Creek. Contrary to the unfounded assumption that by the proposed unit train rate Erie Lackawanna is competing against itself, the hard fact is that Erie Lackawanna is competing with truckers and soon will be competing with Penn Central for the wheat traffic from Buffalo to Martins Creek.

With respect to the second assumption, that is, that Erie Lackawanna would participate in the movement of no more than 80 percent of the unit trainloads of wheat loaded at Soo Line origins and destined to the Conagra mill at Martins Creek, there is no indication that any part of such movement would be routed other than via Erie Lackawanna from Chicago. The only other railroad operating from Chicago to Martins Creek is Penn Central and that line not only does not participate in the proposed unit train rate but has protested the application of such rate. Thus, Erie Lackawanna would necessarily participate in every unit train movement of wheat from Soo Line origins to Martins Creek under the proposed rate.

The above stated facts show, therefore, that Mr. Bilz's study, purporting to show that the proposed rates would harm rather than help Erie Lackawanna, is based on faulty assumptions; and since the incorrect assumptions were the keystones of Mr. Bilz's calculations, the calculations are equally as incorrect and inoperative as the erroneous assumptions.

The calculations made by Mr. Bilz purporting to show a comparison of the revenue contribution earned by Erie Lackawanna in transporting wheat to Martins Creek at the 40 cent rate from Buffalo and at the proposed unit train rate are set forth on

Sheet 1 of Table 1, attached by Mr. Bilz to his verified statement which was made a part of the Protest and Petition of the Buffalo mills. In order to show a more accurate comparison of the revenue contribution earned by Erie Lackawanna under the five-car rate and under the unit train rate, Sheet 1 of Mr. Bilz's Table 1 has been restated to reflect the true participation and the correct earnings of Erie Lackawanna under each of these rates. (For the purpose of illustration, the restatement uses two factors included in Mr. Bilz's statement, that is, the 90-10 split of the seasonal application of the proposed rate and the 1970 Eastern District unit costs. By the use of these two factors for the purpose of illustration, respondents do not concede that the 90-10 split is correct or that the use of Eastern District unit costs is appropriate.) The restatement is attached hereto as Appendix B.

Appendix B demonstrates that the estimated Erie Lackawanna annual contribution from the proposed unit train movement from Chicago to Martins Creek amounts to $447,720. This estimate assumes that 90 percent of the unit train movement would be under the 72.25¢ rate proposed for application between November 1 and December 14, 1973 and between April 1 and September 15, 1974, and that 10 percent would be under the 88¢ rate applicable during the closed navigation season.

Appendix B shows also that the estimated Erie Lackawanna annual contribution from the movement of wheat under the five-car rate from Buffalo to Martins Creek amounts to only $319,872. This estimate assumes the loss of 36 percent of the volume to truckers based on Conagra's experience during the period from May 3 to October 12, 1973. Thus, the estimated annual improvement in the contribution to Erie-Lackawanna's earnings afforded by the proposed unit train rates is a minimum of $127,848. This is a conservative estimate inasmuch as the volume of wheat estimated to be moved is based on a five-day work week at the Conagra mill at Martins Creek, whereas respondents are advised that Conagra occasionally works on a six-day week. In this event the actual volume of wheat which would be milled under a six-day work week would exceed the estimated 2,100,000 cwt., and correspondingly the improvement in contribution to Erie-Lackawanna's earnings would be greater than $127,848 on an annual basis.

Appendix B shows further that even using the costs constructed by Mr. Bilz, any loss of Buffalo-Martins Creek traffic greater than 10 percent makes the unit train rate beneficial to Erie-Lackawanna. Loss of 36 percent of this traffic has occurred through loss to highway truckers. Additional volume may be diverted to another rail carrier. The 10 percent factor is arrived at by dividing the Chicago-Martins Creek contribution of $447,720 by the contribution per cwt. ($.238) on the Buffalo to Martins Creek move and then relating that volume to total annual volume ($447,720 ÷ $238 = 1,881,176 = 89.6% of 2,100,000 cwt.).

Further, Mr. Bilz's cost statement does not fully reflect the actual cost impact on Erie-Lackawanna in handling 600-700 jumbo covered hopper cars at its already congested Buffalo terminal. While it is difficult to quantify, there would be greater than average terminal switching costs incurred, which further improves the advantage of the unit through train economics.

Another major consideration which weighed heavily in the decision of Erie Lackawanna management to actively pursue the unit through train proposal is the requirement of a commitment of covered hopper cars for the Buffalo-Martins Creek movement. Erie Lackawanna has experienced a critical shortage of covered hoppers during 1973 and continues to lose traffic because of it. For every covered hopper used in the Buffalo-Martins Creek move Erie Lackawanna is losing a carload of traffic elsewhere. For the purpose of estimating the impact of this loss on Erie Lackawanna revenue and contribution to constant costs and profits respondent Erie Lackawanna can use the revenue and costs developed by Mr. Bilz for the Buffalo-Martins Creek move (Bilz Verified Statement, Table 2). Assuming a load of 190,000 lbs. per car at a 40¢ rate, the revenue per car amounts to $760. Accepting for the purpose of this estimate the contribution per cwt. of 23.8¢ developed by Mr. Bilz in his Table 2, Erie Lackawanna's contribution per car amounts to $452. Assuming that the 700 cars used by Erie Lackawanna to transport the estimated annual Buffalo-Martins Creek volume of wheat could have been used to move other traffic by Erie Lackawanna at other locations on the railroad, Erie Lackawanna's revenues would be increased by $532,000 ($760 x 700) and an additional contribution of $316,400 ($452 x 700) would be generated.

The $316,400 of additional contribution together with the $127,800 improvement in contribution shown in Appendix B amounts to $444,200. In other words, net revenue-wise Erie Lackawanna will be more than $444,000 better off each year by having the proposed unit train rate in effect from Soo Line origins to Martins Creek, Pa., than being confined to the present Buffalo-Martins Creek rate. This should lay to rest the specter conjured up by some of the protestants of a desperate Erie Lackawanna joining without thought or reason in a rate in order to "subsidize the Soo Line" and to sacrifice its own traffic and financial interests. The facts set forth above demonstrate that Erie Lackawanna joined in the proposed rate only after thorough consideration and only after determining that it would be substantially better off, from a net revenue-wise standpoint and from a car supply standpoint, if it participated in the proposed unit train rate from Soo Line points to Martins Creek.

(2) Soo Line Response

Surprisingly perhaps, considering the reckless, irresponsible, false allegations of various protestants as to the impact of the proposed rate upon the Erie Lackawanna's net income, none of the protestants have alleged that this publication will produce a negative net contribution to the Soo Line.

Nevertheless, the Commission should be advised and it must be impressed with the fact that the Soo Line, in handling 21 unit trains under the proposed publication (19 at the 72-1/4¢ rate and 2 trains at the 88¢ rate) would generate over $180,000 more in freight revenues than it would receive in handling the same tonnage between the identical origins (Twin Ports or Twin Cities) and the same point of interchange (Chicago) under the Buffalo rates.* The Soo Line and Erie Lackawanna will be irreparably injured if they are deprived of these substantial contributions to their net income by a seven month suspension of the proposed rate.

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*Respondents trust that the Buffalo mills and Penn Central will concede that the Buffalo unit train rates are fully compensatory to both the Soo Line and its eastern connections (including Penn Central). In any event, the Commission so found in Docket No. 34381.

(3) Protestant Penn Central contends also that there is no competitive necessity for the proposed unit train rate and that it will have an adverse effect on the Eastern Railroad's flour traffic - that the combination of the unit train rate on wheat to Martins Creek plus highway movement beyond would displace rail flour movement "from Buffalo and other origins to all destinations within an eastern radius of approximately 125 airline miles from Martins Creek."

This contention completely ignores the facts. The proposed rate is necessary to meet the existing competition of the water carriers in transporting wheat to Buffalo and the competition of motor carriers in moving wheat from Buffalo to Martins Creek. As we have already indicated, 36% of the Buffalo-Martins Creek wheat movement presently moves by motor carrier.

The fear that the unit train rate to Martins Creek would result in displacement of rail flour movement from Buffalo and other origins to all destinations within a 125 mile radius of Martins Creek is completely unrealistic. As Conagra shows in its reply to protests, the Martins Creek mill, at full capacity, can produce only approximately one and one-half million cwts. of flour annually. That reply shows further that the total annual flour consumption in the market area of the Buffalo mills is 60,000,000 cwts. The Martins Creek mill, therefore, even operated at full capacity can compete for only about 4 percent of the flour market. In light of these facts, there clearly is no foundation for the fantastic contention that wheat moved to Martins Creek under the unit train rate will displace rail flour movement from Buffalo and other origins. Unquestionably, the 1-1/2 million cwts. capacity production of flour at Martins Creek could have no meaningful effect on the mills at Buffalo and other flour producing points. In any event, the proposed unit train rate can have no effect on flour mills at Buffalo since the Martins Creek mill is moving wheat to Martins Creek on existing water-rail or water-truck rates which are on the same level as the proposed unit train rate.

(4) Protestants also contend that approval of the proposed rate will result in requests for significant reductions in the rates on flour to the Eastern Seaboard. The Reply of Conagra in this proceeding clearly shows that its costs of delivering flour to Eastern consumers under the proposed rate is greater than the costs of the Buffalo mills to those same consumers. Consequently, there is no rational competitive basis for making any reduction in the rates on flour because of the proposed unit train rate.

(5) Respondents Erie and Soo Line note, in concluding this subsection of their Reply, that the basic "dissipation of revenues" argument by protestants against the proposed rates was made by other protestants, vigorously disputed by the Buffalo mills and Penn Central predecessors, and rejected by the Commission in the Buffalo Unit Train case, Docket No. 34381.

### B. Including the Twin City Origins Does Not Violate Section 15a(2) Or Other Sections of the Act

The proposed rate, as was also the case with respect to the Buffalo unit train rate, is designed primarily to attract to respondents a very limited volume of wheat which can and does move over the Great Lakes from the Twin Ports to Buffalo. However, both of these rates are also made applicable from the Twin Cities as well as Twin Port elevators.

The Twin Cities origins were included in the Buffalo unit train publication at the specific request of the Buffalo millers, most of whom have elevators capable of loading unit trains at both the Twin Ports and the Twin Cities.* Now, however, these Buffalo millers, joined by the Chicago Board of Trade, allege the inclusion of the Twin City origin in the new publication to Martins Creek violates Section 15a(2). Thus, once again, the Buffalo millers demonstrate their adherence to the hoary old credo that "consistency is the hobgoblin of little minds".

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*Thus, at page 38 of their protest the Buffalo millers assert ". . . in the absence of a cataclysmic change in geography, Minneapolis and St. Paul are not ports on the Great Lakes. The consequence is that the according of the drastically reduced rates to Minneapolis-St. Paul is utterly and totally [illegible] dubious theory of the proponents of the tariff. [illegible] further exacerbates the undue and unreasonable prejudice and disadvantage which the protested tariff would cause the flour millers at Buffalo, Minneapolis, and in Kansas and Missouri."

The well known fact is that historically grain rates to the Twin Cities and the Twin Ports from most country origins and grain rates from both terminal areas to the Gulf Ports, Atlantic Ports, and points throughout official territory have always been equalized. There are many valid reasons for this equalization, as the Commission knows full well, and respondents believe the Buffalo mills would ordinarily be among the first to insist that the historical equalization accorded the Twin Cities and the Twin Ports be preserved on both inbound and outbound grain rates.

As early as 1934 in the Docket 17000,Part 7 proceedings, Grain and Grain Products, 205 ICC 301, the Commission prescribed grain rate equalization for the Twin Ports and the Twin Cities with respect to intermarket proportional rates to Chicago, Peoria, and St. Louis.

In the Buffalo unit train case, Docket 34381, Examiner Boisseree disposed of the issues now raised by protestant

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*And Buffalo unit trains have been loaded by Buffalo millers at the Twin Cities, although the predominant movement has originated at Duluth-Superior.

millers with the observation that "To maintain normal rate relations between Duluth, the Twin Cities including Minnesota Transfer, and Superior, the unit train rate was published from the other origins." (Examiner's Report, p. 14).

### C. The Proposed Rate Does Not Violate Section 3(4) Of The Act

The protection afforded connecting lines under Section 3(4) of the Act is specifically limited to any carrier subject to the provisions of this part or any common carrier by water subject to part III. Protesting water carriers are not covered by this provision and this fact is totally dispositive of the unregulated water carriers' assertions that the proposed rate violates Section 3(4).

Respondents also note that the protesting water carriers would be in no position to assert a valid Section 3(4) objection even if they did come within the purview of that section, since they never have requested the Erie Lackawanna to publish an ex-lake unit train rate on wheat from Buffalo to Martins Creek.

The water carriers' contention that Erie Lackawanna has published no reduced rates on wheat from Buffalo to Eastern milling points is incorrect. Protestant Lake Carriers' Association completely ignored two multi-car rates published by Erie

Lackawanna, namely, the five-car rate from Buffalo to Clifton, N.J. of 43¢ and the five-car rate from Buffalo to Martins Creek of 40¢. These rates are both substantially below the 58¢ rate cited by the water carriers. Further, Erie Lackawanna has had no additional requests from shippers for multi-car rates on wheat to on-line Erie Lackawanna points.

### D. Unfounded Allegation That The Protesting Water Carriers Have Inherent Advantages Over Unit Train Operations Is No Basis For Suspending The Proposed Rate

The unregulated water carrier protestants allege they are entitled to protection under Section 15a(2) and the National Transportation Policy because of their inherent advantages in moving wheat over the Great Lakes vis-a-vis the unit train operations proposed by respondents. The "inherent advantage" assertion is stated baldly and without supporting documentation.

Most assuredly the water carrier protestants have neither cost nor service advantages with respect to wheat destined to Martins Creek, Pa., located approximately 240 miles from the closest Great Lakes port. Respondents do not concede that the protesting water carriers have either cost or service advantages over unit train operations even between Duluth and Buffalo.

In Wheat, In Multiple Car Shipments, Minn. & Wis. to Buffalo, Docket No. 34381, Examiner Boisseree noted that:

> "It is well established that a carrier which relies on a claim of inherent cost advantage bears the burden of proving by probative cost evidence the existence of that advantage. Various Commodities From or to Arkansas and Texas, 314 ICC 215. Protestants have failed to sustain such burden, and the record does not permit a determination that the lake carriers have the inherent advantage of a lower cost than respondents in connection with the transportation of wheat from Duluth to Buffalo." (Examiner's Rpt., page 16.)

The Examiner also expressed serious doubts as to the water carriers' alleged service advantages over the railroads. These portions of the Examiner's Recommended Report were adopted by the Commission in its final Order of May 2, 1965.

Certainly it would be both inappropriate and unfair for the Commission to suspend the proposed rate on the basis of this allegation - inapppropriate because the allegation of inherent advantage has no foundation in fact; unfair because suspension would deprive respondents of the opportunity of handling this highly lucrative traffic for a minimum of seven months.

### E. Protestants' "Numbers Game" Approach To Amount Of Rate Reduction Has No Bearing Upon Reasonableness Of Rate Level

Protestants, including the Buffalo millers who certainly know better, have suggested the proposed rate is unlawful because it represents a decrease of 39 percent of the $1.18 single car wheat rate from Duluth to Martins Creek. The Commission has never used a comparison of single car "paper" rates with unit train rates as a basis for finding the latter rates are unduly low. This type of "apples and oranges" comparison is completely irrelevant.

It is noted, in any event, that the percentage reduction involved in the Martins Creek unit train rate is substantially smaller than the comparable reduction adopted when the Duluth-Buffalo unit train rate was published, effective January 8, 1964. The 33-1/2¢ Duluth-Buffalo unit train rate represented a reduction of 54.8 percent from the 72-1/2¢ single car rate then in effect between those points. The Pennsylvania Railroad Company, a predecessor of the Penn Central Railroad, and a protestant herein, was a principal proponent of the Duluth-Buffalo unit train rate.

The Penn Central suggests that the proposed rates represent a "substantial reduction by any standard". As an example, they discuss the "paper" rate of 97¢ cwt. applicable to unit trains of wheat from Duluth and Superior and the Twin Cities to Clifton, N.J. While the Clifton rate has been in effect for several years, it has never moved one pound of freight and it is extremely doubtful that it ever will.

### F. The Proposed Tariff Comports With All Provisions of Sections 4 and 6(1) Of The Act.

#### (1) Response to 4th Section Allegations

The Buffalo unit train rate, originally published as a flat rather than a proportional rate, contained intermediate origin and destination rules which Examiner Boisseree correctly found resolved any Fourth Section problems which might otherwise exist (see Examiner's Report, p. 15) in Docket No. 34381. Subsequently, the Buffalo rate was republished as a proportional rate and concurrently the intermediate origin rule was dropped. The proposed rate publication is identical in all material respects with the form of the Buffalo rate insofar as Section 4 questions are concerned. Both rates comport completely with the Section 4 proscriptions because the need for the intermediate origin rules was obviated by making both rates proportional rather than flat.

In any event all of protestants' Fourth Section arguments conveniently ignore the fact that the proposed rate publication involves a unit train, rather than a single car, rate. There is simply no requirement in the Act that an intermediate origin application be afforded every station located between the Twin Ports-Twin Cities origins and Martins Creek, Pa., where unit train rates are involved.

In this connection, the Commission's attention is respectfully directed to the following Commission decisions which are representative of innumerable other ICC decisions dealing with this subject:

In Coal from Ill., Ind., and Ky., to Illinois and Indiana, 308 ICC 671 (1959), the Commission stated (at p. 677):

> The original application filed in connection with these rates was returned because relief from the long-and-short-haul provision of section 4 of the act was not considered necessary under the principle that like rates and charges must be compared in determining whether a fourth-section violation exists. Since the lower proposed rates to Chicago are multiple-car rates and the higher rates to the intermediate points are single-car rates, the rates and charges were not considered to be the same. See Container Service, 173 ICC 377, 440-441. However, this action was challenged, and the instant application was filed.
>
> If the movement to intermediate points were only in single-car lots or in multiple-car lots less than 1,000 tons, fourth-section relief would not be necessary. However, in applying the fourth section, like transportation services and charges must be compared. Terminal Refrigerating Co. v. Atchison T. & S.F. Ry. Co., 178 ICC 697, 701.

In In the Matter of Container Service, 173 ICC 377 (1931) the Commission noted (at p. 440):

> We have repeatedly said that in determining whether violations of this section (4) exist, like rates must be compared.

(2) Response to Section 6 Allegation

In their Suspension Petition, the Buffalo millers suggest the rules named in Item 130 of the protested tariff are "shot full of ambiguity, vagueness, inconsistency and contradiction", and suggest that there may be violations of Section 6(1) of the Act. These allegations are as inaccurate as they are colorful. The tariff does name exact and precise rules under which the rate will apply.

The provisions of Item 130 are very familiar to the Commission. At least two tariffs are on file with and have been accepted by the Commission with provisions virtually identical to Item 130 of Soo Line F.T. 543-B, ICC 7837 (see Item 320 of Chicago & North Western Transportation Co. F.T. 17194, ICC No. 1 and Item 320 of Chicago, Milwaukee, St. Paul and Pacific F.T. 18710, ICC No. B-8305). The rules clearly provide that trains will be billed individually as they move and freight will be paid under the rules prescribed by the Commission.

## G. Approval Of The Proposed Rate Will Not Adversely Affect Car Supply Of Country Elevators Served By Soo Line

Commencing at page 25 of their Protest, the Buffalo millers assert:

> " . . . in the experience of these protestants the Soo has encountered, and can be expected to continue to encounter, severe problems in meeting grain shippers' rail transportation needs. These problems became extremely acute during the summer of 1973 and resulted in the Soo's being unable to handle existing wheat traffic from country points to Duluth for movement by water. The Soo's inabilities in this regard arose, in these protestants' experience, from equipment shortages as well as deficiencies in power and crews. If the Soo is unable to handle existing wheat traffic, it will be in no position to handle added traffic under the new, protested unit train rates."

Respondent Soo Line acknowledges the fact that it has experienced difficulty in meeting the enormous car supply requirements of the country elevators which it serves in North Dakota, South Dakota, Montana and Northern Minnesota during the past year and that this problem will continue for some months to come.

However, at the risk of appearing to be immodest, respondent Soo Line alleges that, under all the circumstances, it has done a commendable job of providing grain cars to all of its grain shippers, including both the country elevators and the terminal elevators which it serves in the Twin Cities and the Twin Ports. In support of this statement, respondents note the following facts:

During the thirteen month period commencing August 1, 1971, the Soo Line originated substantially more carloads of grain than it had originated during any comparable period in its history. Nevertheless, as shown by the following table, during the thirteen month period commencing August 1, 1972, the Soo Line increased very substantially the volume of the traffic it handled during the earlier period.

## TABLE

### SOO LINE CARLOAD ORIGINATIONS OF GRAIN FROM COUNTRY AND TERMINAL ELEVATORS

| Origin | Period Covered | |
|---|---|---|
| | August, 1971 through Sept. 1972 | August, 1972 through Sept. 1973 |
| Country Elevators | 38,645 | 72,918 |
| Terminal Elevators | 14,919 | 20,804 |
| Total Carloadings | 53,564 | 93,722 |

As shown by the foregoing table, during the more recent period country grain carloadings increased by 34,273 cars (88.7%)

while terminal elevator carloading increased by 5,885 cars (39.4%). During the later period, country carloadings accounted for 77.8% of all grain carloadings.

Respondent Soo Line alleges further that many country elevators, together with other parties having a genuine interest in their welfare, have been highly complimentary of the Soo Line for its ability to meet the grain car supply requirements of the country elevators which it serves. In support of this allegation, respondents attach hereto, identified as Appendix C, a copy of an advertisement which ran in the ENDERLIN (North Dakota) INDEPENDENT on October 4, 1973. This advertisement, prepared and paid for by the Peoples and Enderlin State Bank, was not solicited by the Soo Line nor was the Soo Line advised it would be run prior to its publication.

As of October 1, 1973 the Soo Line owned 1854 jumbo covered hoppers which are used primarily in its grain service. The original value of these cars exceeded $33.5 million. Commencing in November, 1973 the Soo Line will take delivery of an additional 200 jumbo hoppers at a cost exceeding $3.8 million. The Soo Line decided to make this new acquisition, in part, to handle Conagra's unit grain trains to Martins Creek, Pa.

Respondent Soo Line has no desire to belabor this point unduly but it does assure the Commission that approval of the protested rate will not prejudice legitimate interests of other shippers it is obligated to serve, including both country elevators and the Buffalo millers moving unit grain trains to Buffalo. The Soo Line is on record with the Commission as having no objection to the present provisions of Car Service Rule No. 1120. It has complied meticulously with its terms heretofore and will continue to do so in the future.

## IV

## CONCLUSION

Respondents having less than 48 hours to prepare their Reply to eight suspension petitions have not attempted to respond to every allegation set forth in said petitions. To do so would be unnecessary and, indeed, an affront to the Commission's expertise in rate making matters. Most of the suspension petitions have been inordinately long on (1) unfounded statements of "fact", (2) irrational assumptions and conclusions, and (3) extremely pejorative phrases. In replying to these petitions respondents have resisted the temptation, hopefully with some success, to respond in kind.

Respondents do respectfully submit that the proposed rate has been shown, in this reply and the reply being filed concurrently by Conagra, to be lawful, highly profitable to both

Erie Lackawanna and Soo Line, and non-injurious to any of those parties who seek its suspension.

Approval of the proposed rate, as shown herein, will improve the annual net revenue position of respondent Erie Lackawanna by approximately $450,000 and will be highly profitable to respondent Soo Line.

Protestants' allegations of unlawfulness and dire economic consequences resulting from approval of the proposed rate have been shown by Conagra and respondents herein to be unfounded. As previously noted, most of these identical allegations were considered and rejected by Judge Boisseree and the Commission in Docket No. 34381.

WHEREFORE, respondents pray that the proposed rate be permitted to become effective as scheduled, without investigation, and that protestants' petitions be denied in all respects and these proceedings terminated.

Respectfully submitted,

J. T. Clark
Erie Lackawanna Ry. Co.
1336 Midland Building
Cleveland, Ohio 44115

C. Harold Peterson
Soo Line Railroad Company
804 Soo Line Building
Minneapolis, Minnesota 55440

By ______________________
C. Harold Peterson

# APPENDIX A

## List of Protestants

1. Board of Trade of the City of Chicago

2. General Mills, Inc.
   International Multifoods Corporation
   Peavey Company
   The Pillsbury Company
   Standard Milling Company
   ADM Milling Company
   Ross Industries, Inc.

3. Kansas-Missouri River Mills

4. The Kinsman Marine Transit Company

5. Lake Carriers' Association

6. Niagara Frontier Transportation Authority
   American Federation of Grain Millers Local No. 36
   Grain Elevator Employees Local No. 1286, I.L.A.
   International Association of Great Lakes Ports
   International Longshoremen's Association Local 109
   Buffalo Area Chamber of Commerce
   Maritime Trades Department Buffalo Port Council, AFL-CIO
   Inland Boatman's Union, S.I.U.
   Buffalo Typographical Union No. 9

7. Penn Central Transportation Company

8. Great Lakes Ship Owners Association

Appendix B

## TABLE 1

## COMPARISON OF THE RAIL REVENUE CONTRIBUTION EARNED BY THE ERIE-LACKAWANNA RAILWAY IN TRANSPORTING WHEAT TO MARTINS CREEK, PA. AT THE PRESENT RATE FROM BUFFALO AND AT THE PROPOSED UNIT TRAIN RATES

2,100,000 cwts. per year[2]

| ne o. | ITEM | Movements at Present 5-Car Rate From Buffalo to Martins Creek | Movements at Proposed Unit Train Rate to Martins Creek, Pa. In Soo Line Cars | | |
|---|---|---|---|---|---|
| | (1) | (2) | (3) | (4) | (5) |
| 1 | Revenue Per Cwt.[1] | 40.0¢ | 47.0¢ | 57.2¢ | xxx |
| 2 | Variable Cost Per Cwt. | 16.2 | 26.7 | 26.7 | xxx |
| 3 | Revenue Contribution Per Cwt. (L.1 - L.2) | 23.8 | 20.3 | 30.5 | xxx |
| 4 | Percent via Rail | 64% | 90% | 10% | 100% |
| | Annual Volume of Wheat to Martins Creek | | | | |
| 5 | Cwt. Transported by Rail | 1,344,000 | 1,890,000 | 210,000 | 2,100,000 |
| 6 | Total Revenue Contribution (L.3 x L.5) | $319,872 | $383,670 | $64,050 | $447,720 |
| 7 | Increase of Rev. Contrib. at Proposed Rates | xxx | xxx | xxx | $127,848 |

[1] Based on proposed through rate of 72.25¢ applicable during period from April 1 through December 14 and 88¢ applicable during period from December 15 through March 31. Revenue per cwt. in columns (3) and (4) is computed on basis of division 65% to the Erie Lackawanna.

[2] Appendix C to Buffalo mills Protest, rounded to nearest thousand.

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SERVICE DATE
NOVEMBER 20 73

ORDER

# INTERSTATE COMMERCE COMMISSION

## INVESTIGATION AND SUSPENSION DOCKET NO. 8899

## UNIT TRAIN RATES ON WHEAT, MINN. & WISC. TO MARTINS CREEK, PA.

PRESENT: Virginia Mae Brown, Commissioner, to whom the matter which is the subject of this order has been referred for action thereon.

It appearing, That by order dated October 31, 1973, the Commission, Appellate Division 2, instituted an investigation into and concerning the lawfulness of new reduced rates and charges, and new rules, regulations, and practices affecting such rates and charges, applicable on interstate or foreign commerce contained in the tariff schedules designated in said order and suspended the operation of said tariff schedules to and including May 31, 1974;

And it further appearing, That upon consideration of the record in the above-entitled proceeding, this matter is one which should be referred to an Administrative Law Judge for hearing; and for good cause shown:

It is ordered, That the above-entitled proceeding be, and it is hereby, referred to an Administrative Law Judge for hearing.

It is further ordered, That on or before December 17, 1973, the respondents and intervenors in support, shall file with the Commission three copies of the verified statements of their witnesses, in writing, together with any studies to be offered at the hearing with a statement where the underlying work papers to such studies will be available for inspection by parties to the proceeding and at the same time, serve a copy of such prepared material upon all parties who have made know their desire to actively participate in the proceeding to the Commission and to the respondents on or before December 10, 1973.

It is further ordered, That on or before January 15, 1974, protestants and any party in support thereof shall file with the Commission three copies of reply verified statements of their witnesses, in writing, and at the same time, serve a copy of such prepared material upon all parties of record. Those parties who desire to actively participate and receive copies of the prepared material to be served shall notify the Commission, in writing, on or before December 10, 1973, as well as all parties of record. Otherwise, any interested person desiring to participate in these proceedings may make his appearance at the hearing.

It is further ordered, That parties desiring to cross-examine witnesses who have submitted verified statements shall give notice to that effect, in writing, to the affiant and his counsel, if any, on or before January 22, 1974, a copy of such notice to be filed simultaneously with the Commission, together with a request for any underlying data that the witnesses will be expected to have available for immediate reference at the hearing. All verified statements and attachments as to which no cross-examination is requested will be considered as part of the record. Any witness who has been requested to appear for cross-examination but fails to do so, subjects his verified statement to a motion to strike.

It is further ordered, That a hearing will be held commencing on January 28, 1974, at 9:30 a.m. United States Standard Time, at the Offices of the Interstate Commerce Commission, Washington, D. C., for the purpose of hearing cross-examination of witnesses so requested; to afford opportunity to present evidence in opposition to the cross-examination; and such other pertinent evidence which the Administrative Law Judge deems necessary to complete the record.

And it is further ordered, That a copy of this order be served upon all respondents and protestants to this proceeding and that a copy be filed in the Office of the Secretary of the Commission as notice to the public.

Dated at Washington, D. C., this 15th day of November 1973.

By the Commission, Commissioner Brown.

ROBERT L. OSWALD
Secretary

(SEAL)

93

Pa 9

ROBERT J. ABLES
ATTORNEY AT LAW
FEDERAL BAR BUILDING WEST
1819 H STREET, N. W.
WASHINGTON, D. C. 20006
(202) 223-4000

January 14, 1974

Robert L. Oswald, Esquire
Secretary
Interstate Commerce Commission
Washington, D. C. 20423

Re: I & S No. 8899 - Unit Train Rates on Wheat, Minn. & Wisc., to Martins Creek, Pa.

Dear Mr. Oswald:

Please be advised that The Kinsman Marine Transit Company, protestant in subject investigation, is withdrawing as a party to the proceeding. Kinsman will pursue its interests in this matter as a member of the Lake Carriers Association, another protestant in this proceeding.

Very truly yours,

Robert J. Ables

Robert J. Ables
Attorney for
The Kinsman Marine Transit Company

RJA:mw

cc: All known parties of interest.

134- PG

BEFORE THE

INTERSTATE COMMERCE COMMISSION

---

I&S DOCKET NO. 8899

## UNIT TRAIN RATES ON WHEAT, MINNESOTA AND WISCONSIN TO MARTINS CREEK, PA.

---

## BRIEF OF

## PROTESTANT BOARD OF TRADE OF THE CITY OF CHICAGO

---

BOARD OF TRADE OF THE
CITY OF CHICAGO

Frank E. Polom
Executive Director of Transportation
141 West Jackson Boulevard
Chicago, Illinois 60604
312/435/3500

Fri.

Due: March 25, 1974

## TABLE OF CASES CITED

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

---

I&S DOCKET NO. 8899

# UNIT TRAIN RATES ON WHEAT, MINNESOTA AND WISCONSIN TO MARTINS CREEK, PA

---

## BRIEF OF PROTESTANT BOARD OF TRADE OF THE CITY OF CHICAGO

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## I

## Statement of the Case

The rates in issue are published in Item 140, Soo Line Railroad Unit Train Grain Tariff 543-B, I.C.C.-7837, Two levels of rates are published, proportional in nature, applicable on wheat only, in bulk, from Duluth, Minneapolis, Minnesota Transfer, and St. Paul, Minnesota, and Superior, Wisconsin, to Martins Creek, Pennsylvania, with routing via Soo Line-Chicago-Erie Lackawanna Railroads. The proportional rate of 72.25¢ cwt. (X-299 level) would apply during the period of open navigation on the Great Lakes, generally April 1 thru December 14 of each year.

The proportional rate of 88¢ cwt. (X-299 level) would be applicable during the period beginning December 15, and ending March 31 of the ensuing year. As indicated above, both rates are published as proportional rate factors and are applicable only on traffic which has originated beyond by rail. Rates will also apply on wheat stored in transit at stations from which the proportional rates apply. The proposed rates are applicable in covered hopper cars with a capacity of 4500 cubic feet or more, minimum weight 190,000 lbs. per car used, with further requirement of an aggregate minimum weight per movement of 5,000 tons, approximating 50 covered hopper cars. The application of the rates further requires the consignee at destination to receive a total of three consecutive movements, consisting of the same cars as in the original movement. Each subsequent shipment must consist of not less than three consecutive movements which consignee may originate at the same or any of the other origins named in Item 140, namely, the stations from which the proportional rates are applicable.

Twenty-four (24) hours free time, exclusive of Saturdays, Sundays or Holidays, will be permitted for loading of all the cars sufficient in number to hold the aggregate minimum weight per movement required under the tariff. Thirty-six (36) hours free-time, exclusive of Saturdays, Sundays or Holidays will be permitted for unloading the entire unit train at destination. Failure to load all cars at origin and unload at destination within the prescribed free time results in detention charges of $475.00 for each twenty-four (24) hour period, or fraction thereof, subsequent to free time at origin and $9.50 per car for each twenty four (24) hour period, or fraction thereof, subsequent to the free time at destination. Routing from all origins to destination is confined to Soo Line-Chicago-Erie Lackawanna. Intermediate application at destination end will apply; however, no similar intermediate at origin rule is published. Tariff is subject to TPO Maurer's Mileage Tariff 7-C, I.C.C. H-54. Other tariff provisions spell out the requirement of one bill of lading for the entire unit train from one consignor at one location at origin to one consignee at destination. Transit, inspection, weighing, diversion or reconsignment will not be permitted. The proponents' justification for the publication of the rates at issue herein is to compete with the alternative modes of transportation via water-truck and/or water-rail.

Subsequent to the filing of several protests, Division Two entered an Order of Suspension and Investigation dated October 31, 1973, the suspension period to expire May 31, 1974. Subsequent joint petition of respondent carriers and petition of Conagra in support of respondents for reconsideration were denied.

The case was handled under special rules of procedure promulgated by further order of the Commission dated November 15, 1973, and the proceedings were referred to Administrative Law Judge Richard A. White. Oral hearings for the purpose of cross examination of witnesses commenced in

Washington, D.C. on January 28, and were terminated on February 5, 1974. The brief due date was set for March 25, 1974.

Under date of February 6, 1974, flour millers protestants filed a petition for issuance of the initial report and order by the entire Commission for reasons stated therein, and this protestant supported that petition.

## II

## Identification and Interest of the Chicago Board of Trade

The Board of Trade of the City of Chicago (CBT) is a corporation created by an act of the Illinois Legislature, with its principal place of business in the City of Chicago, Illinois. It now maintains, and has maintained for more than 125 years, a commodity exchange where its members meet daily for the purpose of buying and selling grain, grain products, and other non-agricultural commodities. Among its 1402 members are terminal storage operators, grain merchandisers, cash grain merchants, processors, millers, exporters, small, medium and large, who operate and maintain facilities, including transit operations within the switching limits of Chicago and who ship and receive grain and grain products in interstate and foreign commerce.

The Chicago complex of grain storage, marketing and processing facilities, together with its role as an international seaport, provides the largest single market for all grains. Within the switching district there are two wheat mills and a number of grain storage elevators having an aggregate storage capacity of 77 million bushels, 59.6 million bushels represented by 8 elevators located at deep water (Ex. 12, Appendix A). Grain movesinto and out of these facilities via rail, truck, barge, and lake or ocean going vessels. Four grain elevators within the Chicago Switching District (CSD) have a total storage capacity of 4.6 million bushels and are capable of loading unit trains of 50 or more covered hoppers (Ex. 12, Page 4).

## III

## Facts and Arguments

Section 4(1) of the Interstate Commerce Act specifically states that:

> "It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance."

Respondents could have lawfully complied with the provisions of this section by publishing an intermediate rule (origin end) to permit those stations directly intermediate via the published route, Soc-Chicago-Erie Lackawanna the use of the depressed rates. No such tariff provision was published. [1] Furthermore, this protestant found no reference in the tariff schedule which indicated respondents sought and secured from the Commission the necessary relief to depart from the requirements of the Fourth Section of the Act. We submit to the Commission that respondents failed to comply with the requirements of this section and, thus, the rates are in violation of Section 4(1) of the Act.

---

[1] Item 85, Tariff 543-B, I.C.C. 7837 does provide for intermediate application (destination end); however, the record is void as to the location of any flour mill on the EL which station is intermediate to Martins Creek, PA.

The Fourth Section issue was initially raised in the CBT protest and petition for suspension of the tariff schedule. Respondents evaded the issue and treated it lightly by citing cases where the Commission found that in movements under unit train rates, a comparison of like rates and charges must be made to determine whether or not violations of Section 4(1) exist. We maintain that the Commission must go a step further in this instant proceeding to resolve the fourth section issue. Chicago is directly intermediate via the route of movement from the Twin Cities/Twin Ports to Martins Creek, PA. See map illustration as Appendix A hereto which also shows a comparison of the suspended unit train rates with the rates applicable from Chicago for an identical movement. Chicago is a major grain terminal and posesses the capabilities of handling unit trains composed of 50 or more covered hopper cars. It now has available adequate wheat stocks in storage to make it competitive with other terminals but is lacking in a competitive rate level. 2/ Prior to the introduction of the covered hopper cars, the grain rate structure was primarily geared to single car rates. Now that the covered hopper car is "a way of life" in

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2/ Verified Statement identified as Exhibit 12 in the record at Page 4.

the movement of grain and that more and more multiple car and unit train rates are being established, we submit to this Commission that the application of the law with respect to circumstances and conditions surrounding single car movements at single car rates must now prevail with respect to circumstances and conditions surrounding movements of grain in multiple car or unit train shipments at multiple car or unit train rates. Furthermore, the Commission must take into consideration the governing and compelling facts whether or not the intermediate station posesses all the physical capabilities to permit it to use the multiple car or unit train rates applicable from the more distant point. In other words, the Commission must consider in light of the evidence submitted for the record whether the intermediate station is entitled to receive equal treatment under the law insofar as the application of the multiple car rates are concerned from the more distant origin station. There is no doubt in our minds that more and more multiple car and unit train rates will be established by the carriers and the Commission must now take steps to use the same guidelines and criteria in determining Fourth Section violations with respect to the multiple car rates as it now does with respect to the application of single car rates. The first step in this direction has already been taken. The Commission is referred to its rule making proceeding for the purpose of amending Rule 27 of Tariff Circular No. 20 (49 CFR 1300.27). Identified as Ex Parte No. 304, Amendment of Rule 27 of

Tariff Circular No. 20-Intermediate Application of Rates, this amendment would require carriers to publish intermediate rules for the application of rates which are dependent in their application upon the movement of a stated volume of tonnage (trainload, unit train and multiple car) during specified periods of time at intermediate points so as to avoid violations of Section 4 of the Interstate Commerce Act. The instituted proceeding is timely and a necessity to best serve the public interest. The carriers would be obligated to treat intermediate origins under Rule 27 involving multiple car and unit train rates with the same governing principle as that which now applies to single car rates.

Our view is that the carriers have every obligation under Section 4 of the Act in their publication of multiple car and/or unit train rates to permit any intermediate station (at origin and/or destination end), which can comply with the application of those rates, the freedom to use those rates. In this instant proceeding, respondent carriers have published an intermediate destination rule; however, they have failed to provide intermediate stations at the origin end the same type of equal treatment. This is a blatant violation of Section 4 and we so allege.

Chicago has no multiple car or unit train domestic rates applicable on wheat to Martins Creek. The only legitimate comparison with the rates under investigation are shown in the table below:

| From | | To Martin's Creek, Pa. (In Cents cwt) | |
|---|---|---|---|
| Chicago, Ill. | Flat | 98 | |
| Chicago, Ill. | Proportional | 81 | |
| Minneapolis-St. Paul | | 72.25(1) | 88(2) |
| Duluth-Superior | | 72.25(1) | 99(2) |

(1) During open navigation on the Great Lakes
(2) During closed navigation on the Great Lakes

As indicated above and in Appendix "A", the present wheat rates from Chicago to Martins Creek are higher than the suspended rates applicable during open navigation on the Great Lakes. Although Chicago lies directly intermediate in the published route between the origins from which the suspended rates apply and the destination. Martins Creek, Pa., there are no tariff provisions to allow Chicago the use of the suspended rates.

## The Section 3(1) Issue

The rates at issue are published as proportional rates restricted to apply only on traffic which has originated beyond by rail. The rates also apply on traffic which has been stored in transit. See Item 140 and Note 1 therein. Routing from the proportional rate origins is published in Item 145 via Soo Line-Chicago-Erie Lackawanna to Martins Creek. Our quarrel with respondent carriers is directed to the fact that the published rates from the Twin Cities and Twin Ports to Martins Creek, Pa., prohibit and preclude Chicago from the use of the depressed rate levels. Chicago lies directly intermediate between origin and destination via the route of movement. Chicago is a major wheat terminal having facilities to market and handle unit train loads (Ex. 12, Page 4). These elevator storage facilities at Chicago receive wheat via rail, water and motor carrier and forward wheat by the same modes of transportation. The protested rates apply via a route operating through Chicago; yet, elevators at Chicago are precluded from the use of the depressed rates, a blatant violation of Section 3(1) of the Act. The suspended 72.25¢ cwt. proportional rate is lower than the present 81¢ cwt. [3/] proportional rate applicable from Chicago to Martins Creek. Likewise, the 72.25 and the 88¢ cwt. proportional rates are lower than the flat rate of 98¢ cwt. [3/] from Chicago.

Section 3(1) is specific in its condemnation of any undue or unreasonable preference of, or prejudice to:

> "any particular person......association, locality......transit point......in any respect whatsoever; or to subject any particular person......association, locality......transit point..... or any particular description of traffic to any undue or unreasonable or prejudice or disadvantage in any respect whatsoever."

There is no justification for respondents to arbitrarily deny the elevator operators at Chicago the use of the protested rates or comparable rates to apply from Chicago. In Board of Trade of the City of Chicago v. Illinois Central Railroad Company, et al. 344 I.C.C. 818, at Pages 830-831, the Commission set forth the necessary elements of undue preference and prejudice and establishes the burden of proof as to each element.

> "To support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the defendant carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. Compare Big River Industries, Inc. v. Aberdeen & R.R. Co., 329 I.C.C. 539. The complainant has the burden of proving the presence of the first three factors, and the defendants have the burden of justifying the disparity under "4".

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[3/] TPO Maurer's C/TN 245-I, I.C.C. C-375, Section 5.

This is the most recent restatement of the law and principles set forth earlier by the Commission in Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5, 10 (1962); State Corp. Comm. of N. Mex. v. Southwestern Motor Frt., 329 I.C.C. 803, 807 (1967). In this instant proceeding, protestant has the burden of proof with respect to the first three conditions; whereas, respondents must sustain the burden relative to (4) above.

The suspended rates and the rules governing their application meet all of the tests of a Section 3(1) violation. It goes without sayint that a wide disparity does in fact exist between the suspended rates and those applicable from Chicago for an identical movement. The absence of an origin end intermediate rule clearly illustrates an inequality in treatment.

With respect to condition (2) injury, actual or potential, the term as used here to identify an essential element of a Section 3(1) violation, does not mean a "measurable detriment" in the sense of business loss, shipments precluded, or specific profits lost as the direct result of the rate disparity. Rather, the term "injury" as it is used in Section 3(1) cases means the detriment which a person suffers in a competitive situation by being placed in a less advantageous position with respect to freight rates and charges than he would be in if his and his competitors' rates were probably related. Given a disparity in rates, the sine qua non of injury is competition. When a protestant has established such competition, after a showing of disparity in rates, he has shown all he needs to show to establish "injury" under Section 3(1).

The ability of the Chicago merchandisers and elevator operators to remain competitive would be completely eroded by the suspended schedule. The Commission recognized this in *Mayo Shell Corp. v. Baltimore and Ohio Railroad Company*, 297 I.C.C. 133 at Page 135, and said:

> The duty of a carrier to give substantially equal treatment to all shippers who are in a position to demand it includes the right to reach competitive markets on *relatively* equal terms. A rate preference may not be accorded a shipper without a material difference in transportation conditions justifying the preference. An *unjustified difference in freight rates that are factors in the competition between shippers constitutes undue prejudice and preference where, as here, the rates are under the effective control of the participating carrier.*" (Emphasis supplied)

Taking only the fact that a discrimination exists in the rate itself, it can safely be presumed those paying the higher charges would be damaged. This test of injury can be found in *Northeast Kentucky Coal Bureau v. Chesapeake & O. Ry. Co.*, 206 I.C.C. 445, 448, (1935). Also, in *Chrysler Corp. v. Akron, C. & Y. R. Co.*, 279 I.C.C. 377, 404 (1950) a case involving a disparity in rates on automobiles, which disparity was not reflected in selling prices, the same test of injury was employed and was sustained on judicial review in *Illinois Cent. R. Co. v. United States*, 101 F. Supp. 317, 323 (N.D. Ill., 1951), where the court said:

> "Although there may have been no affirmative evidence in terms of "injury" it seems to us that the Commission's ultimate conclusion in this respect was inescapable."

The third condition of a Section 3(1) case is that a carrier or group of carriers control the rates and are the source of both the prejudicial and preferential treatment. Here, the Soo Line and Erie Lackawanna Railroad's publication of the suspended tariff schedule 543-B, I.C.C. 7837, with the only route via Chicago, and the restricted application of the rates, fills the requirements of this third condition.

With respect to condition four of a Section 3(1) violation, the burden of proof is upon the respondents to show that the disparity in rates is no greater than is warranted by differences in the circumstances and conditions surrounding the transportation performed under the assailed rates. The record shows this they have not done. In this instance, to exclude Chicago from the application of the suspended rates is a classic example of a violation of Section 3(1) of the Act.

Going into the area of the tariff publication itself, the application of the rates call for a movement of 50 covered hopper cars, as a unit train, from the Twin Cities/Twin Ports to Martins Creek, Pa. Since the Erie Lackawanna hasadmitted in the record they lack the necessary equipment for this type of movement, the Soo Line will be required to provide all the cars necessary for the move. This is an area that the Commission must consider in depth in view of the equipment shortage in the entire midwest including the area from which the rates apply. Witness Smith (T-86) indicated the Soo Line is experiencing an "excruciating" shortage of covered hopper cars on its line. He further stated at Page 87 that greater profitability accrues to a carrier in a situation where cars are kept in service on its own line and in an area served exclusively by it. The suspended tariff completely defeats this philosophy because the Soo Line will allow 50 of its covered hoppers to be tied up in a unit train movement in which these cars will be off line the greatest portion of time. Since the Soo Line has a substantial investment in the covered hopper car (Witness Smith T-85, 86), the per diem or rental paid by the Erie Lackawanna for use of these cars is an inadequate return on such a substantial investment. We question this decision by the Soo to intentionally allow its covered hopper cars off line while grain shippers located on the Soo Line proper are hurting for rail equipment. More important, the 50 cars are committed for three consecutive movements, further tying up this equipment off line for an additional period of time.

The tariff schedule itself has several deficiencies in violation of Section 6 of the Act. For example, although the rates are published as proportionals, no publication of related flat rates to apply from the Twin Cities/Twin Ports to destination was made. In view of the fact that unit trains are established on a cost oriented basis and the economies of handling such shipments to some extent are passed back to the shippers in the form of reduced freight rates, the Commission must recognize that unit train and multiple car rates are now becoming more common in the grain rate structure. It must recognize that an orderly publication of these rates is a necessity. In a specific area, the publication of an item permitting an intermediate application rule (destination end) without a comparable item for an origin end intermediate application rule is a deficiency in tariff publication. Publication of unit train rates should be flat, or local in nature rather than proportional. This would provide greater flexibility in the application and use of the rates.

In the area of the Erie Lackawanna's cost data, we submit to the Commission that a major deficiency exists for failure of respondent to conduct and submit for the record a switching cost study covering its handling of the entire unit train at destination, namely, from Portland, Pa.—at which point the unit train is broken down to two cuts of 25 cars each—to Martins Creek (Witness McGinnis T-137, 138). The switching procedure was described by Witness McGinnis with the aid of a diagram (Identified as Ex. 4, T-168). This testimony leaves protestant with the opinion that the Erie Lackawanna's facilities are inadequate to handle unit trains of 50 carloads and, more important, all the operating effeciencies which ultimately reduce costs connected with switching cars is negated.

## CONCLUSION

There can be no question that the suspended tariff schedule clearly violates Sections 1(5), 6, 3(1) and 4(1) of the Interstate Commerce Act. Because of the fourth section violation and the absence of appropriate relief to depart from the obligation placed by that section upon respondents, the suspended rates cannot become effective.

WHEREFORE, your protestant prays that the suspended tariff schedule be ordered cancelled and the proceedings dismissed.

Respectfully submitted

BOARD OF TRADE OF THE
CITY OF CHICAGO

Frank E. Polom
Executive Director of Transportation
141 West Jackson Boulevard
Chicago, Illinois 60604

Dated at Chicago, Illinois
March 22, 1974

---

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all known parties of record via first-class mail, postage prepaid.

Dated at Chicago, Illinois, this 22nd day of March, 1974.

Frank E. Polom
Registered Practitioner

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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# UNIT TRAIN RATES ON WHEAT; MINN. & WISC. TO MARTINS CREEK, PA. - DOCKET 8899

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# BRIEF OF INTERNATIONAL ASSOCIATION OF GREAT LAKES PORTS AND THE SEAWAY PORT AUTHORITY OF DULUTH, PROTESTANTS

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INTERNATIONAL ASSOCIATION OF
GREAT LAKES PORTS

SEAWAY PORT AUTHORITY OF DULUTH,
PROTESTANTS

BY____________________________
Robert H. Smith
Attorney for Protestants

P.O. Box 310
Duluth, Minnesota 55801

Due Date: March 24, 1974

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

UNIT TRAIN RATES ON WHEAT; MINN. & WISC.
TO MARTINS CREEK, PA.. - DOCKET 8899

# BRIEF OF INTERNATIONAL ASSOCIATION OF GREAT LAKES PORTS AND THE SEAWAY PORT AUTHORITY OF DULUTH, PROTESTANTS

## STATEMENT OF THE CASE

By order dated August 31, 1973, the Commission, Appelate Division 2, instituted an investigation into and concerning the lawfulness of new reduced rates and charges, rules, regulations and practices published in Soo Line Freight Tariff 543-B, I.C.C. 7837, published to become effective November 1, 1973. The operation of the rates and rules in that tariff were suspended to and including May 31, 1974.

Respondents' petition for reconsideration and expedited hearing dated November 14, 1973 was denied by the Commission's Order of January 2, 1974. A like petition was filed by Conagra, Incorporated, was denied by the same Order. The Commission's Order of November 15, 1973 provided for the submission of evidence in the proceeding by verified statements, and a hearing for the purpose of cross-examination on such statements was held in Washington, D. C., commencing on January 28, 1974 before Administrative Law Judge Richard A. White.

The rates suspended in this proceeding apply on wheat in bulk in covered hopper cars having a capacity of 4500 cubic feet and over. The rates are subject to a minimum weight of 190,000 lbs. per car used; an aggregate minimum weight of 5000 tons per movement; and an aggregate minimum of three consecutive train movements per shipment. Accessorial services such as weighing, inspection, diversion or reconsignment are not permitted on wheat moving at the suspended rates. Instead of standard demurrage provisions rates are subject to 24 hours free time at origin and 36 hours at destination. After expiration of such free time a detention charge of $425 per train is assessed at origin for each 24 hours or fraction thereof, and a charge of $9.50 per car is assessed at destination for each 24 hours or fraction thereof cars are held after the expiration of free time. From April 1 of each year to December 14 of the same year the suspended rate is 72.25 cents per 100 lbs. During the balance of the year, from December 15 of one year to March 31 of the succeeding year, the suspended rates were published at 88 cents per 100 lbs. These rates apply from Duluth, Minneapolis, Minnesota Transfer, and St. Paul, Minnesota, and Superior, Wisconsin to Martins Creek, Pa. via the route of the Soo Line to Chicago, Illinois, thence via Erie Lackawanna Railway Company.

An Abstract of Testimony, as such, will be omitted from this brief, but appropriate reference to record pages on which testimony relied on is to be found will be included in the argument portion hereof.

## ARGUMENT

Protestants, either jointly or severally, allege that the suspended tariff, if permitted to become effective, would be unlawful under Sections 1 (5), 3 (1), 3 (4), 4 (1), 6 (1), and 15a (2) of the Interstate Commerce Act, and contrary to the National Transportation Policy set forth in the preamble to that act.

## THE 72.25 CENTS PER 100 LBS. RATE EFFECTIVE DURING THE SEASON OF NAVIGATION ON THE GREAT LAKES (APRIL 1 TO DECMEBER 14 OF EACH YEAR) IS UNJUST AND UNREASONABLE; CONSTITUTES AN UNFAIR AND DESTRUCTIVE COMPETITIVE PRACTICE; IS AN UNLAWFUL DISSIPATION OF CARRIER REVENUE IN VIOLATION OF SECTION 1 (5) AND SECTION 15a OF THE INTERSTATE ACT, AND CONTRAVENES THE NATIONAL TRANSPORTATION POLICY.

### Rates From Minneapolis and St. Paul

Respondents contend that the 72.25 cent rate is designed to and does meet the transportation cost alternatives in moving wheat from Duluth to Martins Creek; that rate being the sum of the water rate from Duluth to Buffalo of 16 cents per bushel (26.67 cents per 100 lbs.); elevation costs at Buffalo of 5 cents per 100 lbs; and the five car rate published by respondent Erie Lackawanna from Buffalo to Martins Creek of 40 cents per 100 lbs. (Page 12, Witness Ray H. Smith, Exhibit 1) (Page 11 through 14, Witness Stone, Exhibit 16)

While repeatedly insisting that the suspended rates do no more than approximate or equal existing alternatives in transportation cost, respondents fail to point out what alternative transportation cost justifies the application of the 72.25 cent rate from Minneapolis-St. Paul to Martins Creek. The present alternative cost of the transportation from Minneapolis to Martins Creek requires the addition to the rates over the alternative rail/water route from Duluth to Martins Creek of a figure representing the cost of moving wheat from Minneapolis-St. Paul to Duluth of 15 cents per 100 lbs. thus producing an alternative cost via rail-water-rail from Minneapolis to Martins Creek of 87.25 cents. (Page 10, Witness Robert H. Smith, Exhibit 13) By no stretch of the imagination can the application of the 72.25 cent rate from Minneapolis to Martins Creek be characterized as published to meet an alternative cost. To the extent it exceeds the alternative costs of 87.25 cents, it is unreasonably low and a dissipation of the carriers' revenue. The only justification offered for this unique situation is contained in the testimony of Witness Ray H. Smith. This testimony appears on Page 6 and 7 of Exhibit and Appendix 5 thereto. It consists of nothing more than a statement that Duluth and Minneapolis sometimes have a parity in grain rates and illustrates some of these situations in the appendix. The parity of proportional rates prescribed in the Grain and Grain Products, 205 I.C.C. 301, and subsequent reports. therein, was but a part of the system of combinations of local rates into the markets, and proportionals out of the markets, which were prescribed in 1934 in an endeavor to effect a reasonable, non-preferential and non-prejudicial grain rate structure from origin to destination. As a part of that structure, the same proportional rates were prescribed from Minneapolis and Duluth to Chicago, Peoria, and St. Louis. In that same case rates three cents higher than the rates from Minneapolis and Duluth, to Chicago were prescribed from the Missouri River markets of Kansas City, Omaha, and Sioux City. That difference due to the operation of ex parte increases has reached 6½ cents at the Ex Parte 281 level. We submit that it would be equally appropriate to establish unit train rates from Kansas City and Omaha to Martins Creek three cents above Duluth, because that relationship was prescribed in the Grain Case, as it is to publish rates from Minneapolis and Duluth to Martins Creek on a parity. The rates to Baltimore and Norfolk shown in Appendix 5 are at a parity today because the single car rates which they displaced were a combination of rates over Chicago, to which market Duluth and Minneapolis had identical proportional rates. However, that may be, the fact that a parity of grain rates exists in a few situations certainly does not justify a parity where the base rate is said to be made to equalize a water-rail rate, and an additional 160 miles of transportation is required to put wheat in position to move by water at the base rate from Duluth.

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## Respondents' Cost Studies

The cost studies of respondent Erie Lackawanna appear to be an imperfect collaboration between Witnesses Cannon and McGinnis. Original Exhibits 8 and 9 were corrected by Exhibits 10 and 11 (R 347), and the cost witness had considerable difficulty in identifying certain data requested by the operating witness. To the knowledge of the cost witness (Mr. Cannon) no cost studies were submitted to the Erie Lackawanna management other than Exhibit 8 and 9. (R 354) Included in the Erie costs are the physical cost of splitting up the 50 car unit train into 25 car cuts, the dead-heading of a crew some 80 miles and other unique and unusual operating conditions. (R 372) The cross-examination of Witness McGinnis on Page 123 to 204 of the record and Witness Cannon on Pages 345 to 432 of the record reveal so many ambiguities, inconsistencies and uncertainties in that testimony, that it is entitled to but little, if any, weight. In summary, according to this testimony, the Erie Lackawanna had not ascertained its cost under the proposed rate prior to the preparation of exhibits 8 and 9 for introduction into evidence in this proceeding. At the eleventh hour they apparently found a great deal wrong with

Exhibits 8 and 9, and substituted 10 and 11, which after cross-examination appears to merit the same degree of credibility as the originals.

## THE SUSPENDED RATES VIOLATE SECTION 3 (1) OF THE ACT

As set out in a previous section of this brief the naming of an identical rate during the season of navigation from Minneapolis and Duluth to Martins Creek is unjust and unreasonable and constitutes a destructive competitive practice. In addition, we submit the net result is undue preference of Minneapolis and undue prejudice to Duluth. The Protestant milling companies will undoubtedly deal exhaustively with Section 3 (1) violations, as between Buffalo, on the one hand, and Martins Creek, on the other.

## SECTION 4 VIOLATIONS

Witness Polom's Exhibit 12 deals in considerable detail with the Section 4 violations resulting from the failure of respondents to secure Fourth Section Relief before published the proposed rates. The situation there depicted is so obvious as to require a finding that the suspended rates violate Section 4.

## SUSPENDED RATES VIOLATE SECTION 3 (4) OF THE ACT IN THAT THEY DISCRIMINATE AGAINST LAKE CARRIERS AS CONNECTING LINES.

Respondents may contend that the suspended rates could not violate Section 3 (4) because the water carriers involved are exempt from Commission regulation under Section 303 (c) of Part III of the Act. Such a contention might have met with favor in some quarters prior to the Supreme Court's decisions in Interstate Commerce Commission v. Mechling 330 I.C.C. 567 and Dixie Carriers, Inc. v. United States 351 U. S. 56, which decisions make it abundantly clear, not only that carriers cannot hide their discrimination against ex-water traffic behind the veil of a through rate any more than they can change a higher proportional rate on ex-water than on ex-rail traffic, but also that Congress imposed a duty from Commission to eliminate discrimination whatever guise or form it exists. See Arrow Transp. Co. v. U. S., 176 F. Supp. 411.

In American Barge Line Co. v. Alabama G. S. R. Co. 306 I.C.C. 167, the Commission found that the failure of defendant railroads to apply to the transportation of grain and grain products in carloads to the destinations named in the complaint when such traffic is brought to those ports by common carriers by water, proportional rates the same as they maintain for transportation over the same routes from and to the same points when the grain and grain products are brought to said ports by rail was and for the future would be discriminatory under Section 3 (4). The dissenting opinion of Commissioner Arpaia in arguing that the barge lines were not connecting lines subject to Section 3 (4) states at Page 180:

> "The record fails to show any barge transportation of grain except on the in-barge rates. Moreover, the record shows that it is impractical to transfer from barges to cars by the method contemplated by use of the in-car rates.
>
> It is thus difficult to see how the publication of the in-car rates and the facilities provided in connection therewith could compel a change in the prior conclusion that there is no arrangement for continuous carriage or shipment of grain through the port cities by barge and rail, and thus give to the barge lines the status of connecting lines.
>
> As used in Section 3 (4) a connecting line is defined as that of any carrier subject to part I or any common carrier by water subject to part III. Barge transportation of grain, a bulk commodity, is exempted from regulation under certain conditions not shown to be applicable here. The filing of these rates, therefore, cannot ipso facto serve to "qualify" barge lines as connecting carriers within the meaning of Section 3 (4)

In previous decisions in this same proceeding at 296 I.C.C. 247 and 303 I.C.C. 463, the Commission had decided that the complainant barge lines were not common carriers or subject to Part III. The report on further hearing of the Commission's in this proceeding (306 I.C.C. 167) clearly states that the only reason it had reversed its previous decision therein and found the failure to maintain identical proportional rates on ex-rail and ex-barge traffic from and to the same points was in violation of Section 3 (4) of the Act was by reason of the court's decision in Mechling and Dixie Carriers.

We submit that the only distinction between the case at bar and American Barge Lines v. Alabama G. S. R. supra, and State Corporation of Kansas v. Arrow Transportation Co. 361 U. S. 353 is the fact that barge carriers rather than lake carriers were involved in the cases just cited. While the carriage of grain on the lakes is exempt, the carriage of grain by barge is likewise exempt in part III of the Act from Commission regulation. In both instances the water rates and rail rates are published separately. In the instant case the Section 3 (4) violation could be removed by the publication of joint rates or cancellation of the suspended rates. However, in Mechling, supra, and

Interstate Commerce Commission v. James McWilliam Blue Line, Inc. 342 U. S. 951, Section 3 (4) violations could be removed only by equalizing ex-water with ex-rail proportionals. The difference is not controlling. See Arrow Transp. Co. v. U. S. 176, F. Supp 411, affirmed sub nominum State Corporation Commission of Kansas v. Arrow Transportation Co. 361 U. S. 353, where it was held that defendants violated Section 3 (4) by charging ex-barge grain more than they received as divisions for transporting ex-rail grain beyond the ports.

We respectfully submit that the same unlawful violations of Section 3 (4) which appear in the suspended rates are inherent in the various wheat rates from Duluth and Minneapolis to Buffalo. Insofar as the Erie is concerned, its failure to establish joint rates with water carriers from Chicago to Buffalo on a through movement from either Minneapolis or Duluth to Buffalo is a manifest violation of this section.

Page 3 of the appendix to Witness Robert H. Smith's exhibit 13 indicates the in-roads which the Buffalo unit train rates have made in the water movement from Duluth/Superior to Buffalo. In 1963, the year before the unit train rates to Buffalo from Duluth and Minneapolis were established, 13,816,000 bushels of wheat, 18.1% of the total domestic movement went by rail. In the next year 1964, 30,094,000, or 44.4% of total domestic wheat shipments moved by rail. In 1973 the rail movement had increased to 42,485,000 bushels or 49.9% by rail. To conclusively illustrate the effect of the unit train idea on water tonnages on wheat from Duluth/Superior, pages 4 and 5 of Witness Smith's Exhibit 13 describe in detail the comparison of rail and water movements of wheat from 1960 through 1973. For convenience they are quoted below.

> "Page 3 of the Appendix shows the domestic movement of wheat from Duluth/Superior for the years 1960 to 1973, inclusive. This page of the Appendix shows the total domestic tonnage moving from Duluth/Superior in column 2, and the rail movement from Duluth/Superior to all destinations is shown in column 3. In column 4 and 5 are shown the domestic wheat movement by lake in total and to Buffalo. Column 6 of page 3 of the Appendix shows the percentage of the total domestic movement from Duluth/Superior which moves by rail. It will be noted that for the years 1960 to 1963 rail movement constituted less than 22% of the total domestic movement. Thereafter, in 1964 and succeeding years, the rail movement ranges from a low of 29.8% in 1965 to a high of 49.6% in 1972. Column 7 shows the percentages the domestic lake movement was of the total movement from Duluth/Superior for the same years, 1960 to 1973. Prior to 1963, the domestic lake movement ranged from a low of 78.6% of the total movement for these years. After 1963, the proportion of domestic wheat moving by lake to domestic destinations declined, ranging from a

> high of 70.2% in 1965 to a low of 50.4% in 1972. The exhibit generally shows that the lake movement has been downward since 1964 contrasted with the upward movement of wheat by rail shown in column 6."

This testimony and page 3 of the Appendix clearly indicate the inroads made by unreasonably low unit train rates into the business of the lake carriers.

## CONCLUSION

On the basis of the record as made, and in view of the foregoing arguments, as well as those presented by other protestants, these protestants respectfully request that the Administrative Law Judge and the Commission find that the respondents have not borne the burden of proving that the suspended rates are lawful under Sections 1 (5), 3 (1), 3 (4), 4 (1), 6 (1), 15a (2) of the Interstate Commerce Act, and do not contravene the National Transportation Policy.

Accordingly, the suspended rates should be ordered cancelled, and the investigation discontinued.

Respectfully submitted,

INTERNATIONAL ASSOCIATION OF
GREAT LAKES PORTS

SEAWAY PORT AUTHORITY OF DULUTH,
PROTESTANTS

BY______________________________
Robert H. Smith
Attorney for Protestants

BEFORE THE

INTERSTATE COMMERCE COMMISSION

---

I&S No. 8899

# UNIT TRAIN RATES ON WHEAT, MINN. & WISC., TO MARTINS CREEK, PA.

---

# BRIEF ON BEHALF OF PROTESTANT FLOUR MILLING COMPANIES

---

Peavey Company
Minneapolis, Minnesota 55415

The Pillsbury Company
Minneapolis, Minnesota 55415

Standard Milling Company
Kansas City, Missouri 64105

ADM Milling Company
Shawnee Mission, Kansas 66211

Ross Industries, Inc.
Wichita, Kansas 67201

General Mills, Inc.
Minneapolis, Minnesota 55440

International Multifoods Corporation
Minneapolis, Minnesota 55402

Protestants

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Attorneys

Due Date: March 25, 1974

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

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I&S No. 8899

UNIT TRAIN RATES ON WHEAT, MINN. &
WISC., TO MARTINS CREEK, PA.

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# BRIEF ON BEHALF OF PROTESTANT FLOUR MILLING COMPANIES

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## Prefatory Comment

On October 31, 1974 the Commission, Division 2, acting as an appellate division, issued an Order of Suspension and Investigation with respect to Soo Line Railroad Company Tariff 543-B, I.C.C. 7837 with a scheduled effective date of November 1, 1973. The aforesaid tariff is suspended to and including May 31, 1974, unless otherwise ordered by this Commission.

On January 2, 1974 the Commission, Division 2, acting as an appellate division, denied a joint petition of Soo Line Railroad Company and Erie Lackawanna Railway and a petition of ConAgra, Incorporated, which had requested vacation of the Order of Suspension.

The provisions of the suspended tariff are found in Appendix 3 to Exhibit No. 1. It is described as a unit train grain tariff applicable to wheat, in bulk, from Superior, Wisconsin and the Minnesota origin points of Duluth, Minneapolis, St. Paul and Minnesota Transfer. The destination is Martins Creek, Pa. where is located a flour mill of ConAgra, Incorporated (ConAgra). The latter mill officially opened on June 18, 1973. ConAgra's Martins Creek "A" plant is located approximately 1.1 miles from the Martins Creek "B" plant elevator facility where rail cars are unloaded. The latter plant is local to the Erie Lackawanna Railway (hereinafter Lackawanna). (Ex. 16, pp. 4-5)*

The suspended rate is subject to a minimum weight limitation of 190,000 pounds per car, an aggregate minimum weight of 5,000 tons per movement (train) and a minimum aggregate of three consecutive train movements per shipment. Normal terminal and transfer services, such as weighing, inspection, diversion or reconsignment will not apply in connection with the suspended rate. In lieu of standard demurrage provisions, the rate is subject to 24 hours free time at origin and 36 hours free time at destination.

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* The following abbreviations will be used: Ex. - Exhibit; p. - page; App. - Appendix; R. - Transcript page of oral hearings; cwt. - hundredweight.

Beyond this free time a special detention charge of $475.00 per train would be assessed at origin for each 24 hours or a fraction thereof, and a charge of $9.50 per car would be assessed at destination for each 24 hours or fraction thereof. (Ex. 1, pp. 4-5 and App. 3)

The suspended tariff contains two levels of rates, purportedly related to the period of open navigation on the Great Lakes and the period of non-navigation. The level of the proposed rate from April 1 to December 14 would be 72.25¢ per cwt. From December 15 to March 31 the rate level would be 88¢ per cwt. As presently published the suspended tariff would expire on September 15, 1974 but may be renewed on a year-to-year basis. (Ex. 1, p. 5 and App. 3)

A predecessor to the presently suspended rates was a tariff published in the fall of 1972 by the Soo and Erie which was characterized by an annual volume requirement of 100,000 tons in conjunction with a purported unit train rate on wheat of 62.5¢ per cwt. to Martins Creek from the Minnesota and Wisconsin origins previously mentioned. The Commission, Division 2, acting as an appellate division, issued an Order of Suspension and Investigation with respect to this earlier rate in I&S No. 8784, Wheat, Annual Volume Rate, Minn. and Wisc. to Martins Creek, Pa., on September 15, 1972. Thereafter the Soo and the Erie withdrew the latter tariff and I&S No. 8784 was discontinued.

In the present case the proceedings were handled under special rules of procedures wherein the direct evidence was presented in verified statement form. Oral hearings were held at Washington, D.C. before Administrative Law Judge Richard A. White on January 28 through February 1 and on February 4-5, 1974.

## Identity Of These Protestants

This Brief is submitted in behalf of Peavey Company (Peavey), The Pillsbury Company (Pillsbury), Standard Milling Company (Standard), ADM Milling Company (ADM), Ross Industries, Inc. (Ross), General Mills, Inc. (GMI), and International Multifoods Corporation (IMF).

Peavey at Buffalo, New York operates a flour mill with a daily wheat flour capacity of 10,500 cwts. (and a durum products mill with a daily capacity of 5,000 cwts.) At Buffalo Peavey also operates an elevator with a capacity of 3,250,000 bushels. The flour mill and the elevator are served by the Penn Central and are located side-by-side on the Buffalo River which flows into Lake Erie. (Ex. 18, p. 2 and App. A)

Pillsbury operates both a flour mill and an elevator at Buffalo on the Blackwell Canal. Its flour mill presently has a daily productive capacity of 17,500 cwts. There had been a fire on the premises on January 2, 1972, prior to which the daily capacity of that mill had been 29,000 cwts. In undoing the damage of the fire, it was the decision of Pillsbury to restore operations to a 17,500 cwt. daily capacity rather than the former 29,000 cwts. (Ex. 26) Pillsbury's elevator has a capacity of 2 1/4 million bushels. Pillsbury's flour mill and elevator at Buffalo are served by the Buffalo Creek Railroad, a switch line owned jointly by the Erie and Lehigh Valley. The Buffalo Creek connects with all the major railroads serving Buffalo. (Ex.26,p. 2; R. 825, 963)

Standard operates a flour mill at Buffalo with a daily milling capacity of 13,000 cwts. The mill is located within the city of Buffalo proper, 1.5 miles away from harborside and is served directly the Penn Central. Standard also operates at Buffalo a grain elevator located directly on the Buffalo River, which flows into Lake Erie. This grain elevator has a storage capacity of 5 million bushels and is served by the Erie. Because Standard's flour mill is 1.5 miles from the elevator, it is necessary for Standard to truck wheat from the elevator to the mill. (Ex. 19, p. 2) R. 620, 621, 631)

ADM's mills which market flour to the Eastern Territory including Pennsylvania, New York and New Jersey are as follows: a flour mill located at Minneapolis, Minn., with a capacity of 9,500 cwts. per day, served directly by the Milwaukee Railroad; a mill at Red Wing, Minn., with a daily capacity of 5,000 cwts., served directly by the Milwaukee Railroad; a mill at Des Moines, Iowa, with a daily capacity of 7,000 cwts., served directly by the Chicago & North Western. ADM also operates a durum wheat mill at Minneapolis, Minn., for use in the manufacturing of pasta products. This mill has a daily capacity of 12,000 cwts. and is served directly by the Milwaukee Railroads. (Ex. 20, pp. 2-3)

GMI operates a flour mill at Buffalo with a daily wheat flour milling capacity of 12,000 cwts. This facility is engaged primarily in the production of family flour, which is not directly competitive with bakery flour. (Ex. 16 and attached Ex. 1 thereto; R. 487, 488, 644, 745, 823, 824, 845, 915)*

Ross is primarily engaged in flour milling, with mills located in the State of Kansas at Newton with a daily capacity of 7,000 cwts., Wellington with a daily capacity of 7,000 cwts., and Wichita with a daily capacity of 19,000 cwts. Ross' Newton mill is served by the Santa Fe and through reciprocal switching by the Missouri Pacific. Its Wellington mill is also served by the Santa Fe and through reciprocal switching by the Rock Island. The Wichita mill is served by the Wichita Terminal Association, a joint facility of the Santa Fe, the Frisco, the Missouri Pacific and the Rock Island. These mills market flour in Eastern

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*The preponderance of the flour moving from Buffalo to the eastern market is "bakery" flour, as distinct from "family" flour. (R. 646) ConAgra's mill at Martins Creek will produce only bakery flour. (R. 488)

Territory. The states of Pennsylvania, New York and New Jersey account for a substantial portion of the distribution of bakery flour by Ross. (Ex. 21, p. 2)

IMF is a diversified food processing company with flour milling basic to its operations. IMF operates a flour mill at Buffalo with a daily capacity of 21,500 cwts. IMF also operates at Buffalo an elevator with a storage capacity of 4,660,000 bushels. (Ex. 25, pp. 1-3 and App. A)

The protestant companies all market bakery flour in the important Eastern market territory here involved. As earlier noted General Mills primarily produces family flour and ingredient flour for their consumer-mix operation. Only from time to time do they market bakery flour from their Buffalo mill. (R. 915)

Witnesses appearing for these protestant flour milling companies and presenting evidence in this proceeding were as follows: James R. Scoggin, Peavey's Vice President - Traffic (Ex. 18); Standard's Vice President, E.E. Kohlwes (Ex. 19); ADM's Assistant Vice President - Traffic, James R. Woolery (Ex. 20); Ross' General Traffic Manager (now Vice President of Transportation), R. A. Kucharo, Jr. (Ex. 21); Pillsbury's General Traffic Manager, Roger A. Hackbart (Ex. 23); IMF's Vice President - Marketing - Industrial Foods Division, William B. Deatrick (Ex. 25); Pillsbury's Manager - Buffalo

Grain Operations, George D. Goble (Ex. 26). All these protesting companies offered evidence as well through witness Eugene F. Bilz, nationally-known Transportation Consultant and Vice President of Gilbert J. Parr Associates, Inc. (Ex. 31).

All of the foregoing witnesses presented their basic Verified Statements which were assigned the foregoing exhibit numbers and also testified orally at the hearings at Washington, D.C. before Administrative Law Judge White.

## Identification Of Other Protestants

Other protestants presented evidence in this proceeding. The Penn Central Transportation Company (Penn Central), presented evidence through its Director - Market Planning and Research, witness Paul W. Olson (Ex. 27) and its Manager - Service Planning, William F. Wulfhorst (Ex. 24). The Penn Central as well as the Erie serve Buffalo and participate in the substantial movement of flour emanating from Buffalo mills moving to the important Eastern market. (Ex. 27, p. 2; R. 996)

Historically, during the period of navigation on the Great Lakes wheat has moved from the head-of-the-lakes ports of Duluth and Superior via vessel to the port of Buffalo, N.Y. Substantial elevator capacity is available at Duluth and Superior for the storage of wheat pending its transfer to vessel for movement as above described. Lake carriers which participate in this water movement from Duluth/Superior to Buffalo participated in this proceeding through the Lake Carriers' Association, which presented witness Oliver T. Burnham (Exs. 29, 30; Ex. 13, App. A; Ex. 16, p. 9; Ex. 29, pp. 2-3).

The Niagara Frontier Transportation Authority, created by the legislature of the State of New York, seeks the development and improvement of land and water transportation, together with related services, within its district which includes the Port of Buffalo. Its evidence was presented through witness Matthew Carroll (Ex. 22). The Seaway Port Authority of Duluth was created by the legislature of Minnesota to promote the general welfare of its port district, including promoting economic handling of commerce through the Port of Duluth. It's evidence was presented through witness Robert H. Smith, Deputy Executive Director of the Port Authority (Ex. 13).

The Board of Trade of the City of Chicago presented its evidence through witness Frank E. Polom, its Executive Director of Transportation. (Ex. 12)

All of the foregoing parties vigorously attacked the lawfulness of the suspended tariff provisions.

A Statement of Position in Opposition to the Suspended Tariff Provisions was presented at the oral hearings by the United States Maritime Administration, an agency of the federal government charged with the responsibility to develop and maintain the nation's merchant marine under the Merchant Marine Act, 1936, as amended. The County of Erie, New York and the Mayor of Buffalo also filed Statements in Opposition to the Suspended Rates. (R. 63, 1250, 1251)

In addition to the respondents, Soo and Erie, ConAgra participated in the proceeding in support of the tariff provisions under suspension and investigation.

At Martins Creek, the flour mill which has been activated by ConAgra presently has a daily capacity of 6,000 cwts. of bakery flour (Ex. 16, p. 2). ConAgra is a company which has expanded rapidly, with flour milling operations in various part of the country. With primary emphasis on bakery flour, ConAgra's aggregate daily capacity for the production of flour approximates 80,000 cwts. (Ex. 16, pp. 3-4) ConAgra is at least the second largest wheat flour milling company in the United States and may well be the largest producer of bakery flour in the nation. (Ex. 25, pp. 3-4; R. 919-920) This is important to bear in mind evaluating the prospective impact of ConAgra as an aggressive miller and distributor of bakery flour* in the Eastern market to which these flour milling protestants, in competition with others, have moved their bakery flour. It is the expressed intention of ConAgra to supply the Eastern market for bakery flour, including important point such as the New York metropolitan area, Philadelphia and environs and other points in the Middle Atlantic states and New England. The flour is to be moved, not by railroad, but in ConAgra's private trucks. (Ex. 16, pp. 5, 14-15 and attached Ex. 3-A through 3-D, 4; Ex. 25, p. 4) ConAgra is planning an additional flour mill, with 4,000 cwts. per day capacity, at Hudson, N.Y. (R. 487)

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* ConAgra's mill at Martins Creek will produce and distribute only bakery flour. (R. 746)

## The Precarious Status Of The Erie Lackawanna.

The record reveals that the Erie Lackawanna Railway is presently in bankruptcy before the U.S. District Court for the Northern District of Ohio, Honorable Robert B. Krupansky presiding.* As will be developed more fully hereinafter, the above fact provides a special aspect to the instant case. In all earnestness protestants assert that the suspended tariff provisions will result in unjustified and unlawful dissipation of revenues by the Erie - further contributing to its critical financial condition. To this end, these protestants have submitted through witness Eugene F. Bilz a careful and thorough cost/revenue analysis demonstrating this unlawful dissipation of revenue. (Bilz, Ex. 31, R. 1071-1098) The statutory seven month periods of suspension ends on May 31, 1974. Counsel for respondents have indicated they will not extend the suspension period beyond that date if the case has not been decided by that time. (R. 1295) Respondent Soo Line's counsel referred to ". . . this baloney about Erie's financial condition. . ." (R. 1002, 1004-5) Accordingly, these protestants have requested that the decision in this case in the first instance be by the entire Commission. Protestants have made this request on the record. (R. 1296) They have formalized that request by Petition served on all the parties and presented to this Commission on February 6, 1974. In fairness to all the parties and in fairness to the U.S. District Court sitting in the bankruptcy proceeding at Cleveland, the case should be promptly decided and should be decided in the first instance by the entire Commission.

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* The Soo Line indicated in setting the rate it did not take into consideration the precarious financial condition of the Erie. (R. 53)

## The Eastern Flour Market Territory Here Involved.

While the tariff provisions under suspension publish a rate to Martins Creek, Pa., all parties have recognized the essential importance of the Eastern market territory here involved. The flour mills at Buffalo are extremely dependent upon a reasonable opportunity to supply this Eastern market.* The western mills have long relied upon the Eastern market as an outlet for a substantial portion of their bakery flour. (Ex. 18, p. 9; Ex. 19, p. 5; Ex. 20, pp. 2, 3, 7; Ex. 21, pp. 2, 3, 4; Ex. 25, pp. 4, 5 and App. B; Ex. 16, pp. 4, 6, 7, 14, 18; R. 550, 598, 624, 625, 661, 684, 740, 920, 921, 930, 931)

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* Due to the freight rate structure the Buffalo flour mills are unable to market bakery flour to the West or to the Southeast. (R. 31, 32)

As earlier noted, under the suspended tariff provisions ConAgra plans to mill the wheat into bakery flour and transport the same by private truck to key bakery flour consuming points within the Eastern market. (Ex. 16, pp. 5, 6, 14-15, 18-19, Ex. 33, p. 8)

As we shall demonstrate later herein both the respondents and ConAgra have ignored the importance of the element of truck delivery of flour to points in the Eastern market. (Ex. 25, pp. 5-7; Ex. 18, pp. 10-11; Ex. 19, pp. 5-7; Ex. 20, pp. 5-6; Ex. 21, pp. 3, 10, 11)

## The Respondents Have The Burden Of Proving That The Suspended Tariff Provisions Are Just And Reasonable.

The provisions of Section 15(7) of the Interstate Commerce Act make it clear that " . . . the burden of proof shall be upon the carrier[s] to show that the proposed changed rate . . . is just and reasonable. . ." The point was well stated by the Commission, Division 2 in Definition Of Plates And Sheets, 294 I.C.C. 495 at 497:

> ". . . The respondents having proposed certain changes in their existing schedules, we are called upon to determine whether the provisions proposed are in any respect unlawful, and the burden of proof in that respect rests upon the respondents."

See Increased Switching Charges At Duluth, Minnesota, 309 I.C.C. 737 at 764; Iron Or Steel To Shreveport, Louisiana, 297 I.C.C. 108 at 110. The factor of burden of proof is particularly pertinent in the present case especially in the light of the precarious financial condition of the Erie, in view of the bankruptcy proceedings with respect to that carrier before the U. S. District Court at Cleveland, Ohio.

## THE SUSPENDED TARIFF PROVISIONS ARE UNJUST AND UNREASONABLE BECAUSE THE NECESSARY RESULT IS UNWARRANTED AND HARMFUL COMPETITION BY THE ERIE LACKAWANNA RAILWAY WITH ITSELF.

While there are many surprises in the tariff provisions which were suspended by the Commission, Division 2, one of the greatest surprises is the fact that analysis reveals under the suspended tariff provisions the Erie would be engaging in substantial competition with itself! As the record reveals, without genuine dispute, during the period of navigation on the Great Lakes wheat has moved via lake vessel from the head-of-the-lakes ports of Duluth and Superior to Buffalo. There the wheat is transferred into elevators. Thereafter, as required, the wheat is used by the Buffalo mills in the manufacture of flour and moved thereafter by rail to the Eastern market points here involved. The Penn Central and the Erie are important carriers in such movement of bakery flour from Buffalo. (Ex. 29, p. 2; Ex. 18, pp. 2-3, 7-8; Ex. 19, p. 5; Ex. 27, p. 2; R. 572)

During the season of non-navigation on the Great Lakes, wheat is moved via unit train from Duluth-Superior and Minneapolis-St. Paul to Buffalo. The Soo Line and other railroads are origin carriers; the Erie and the Penn Central are destination carriers under this unit train rate, which became effective January 2, 1964. (Ex. 18, pp. 3-6; Ex. 1, pp. 9-10) Bakery flour milled from this wheat also moved to points in the Eastern market by railroad from Buffalo via the Penn Central and the Erie Lackawanna.

This was the background of the situation as to the availability of wheat to be milled into flour at Buffalo when ConAgra made the decision to activate a bakery flour mill at Martins Creek, Pa. While it was open to ConAgra to purchase its wheat at Duluth or Superior, arrange its transportation across the lakes or transport the wheat in the non-navigation season to Buffalo under the existing unit train rate and place some of the wheat in storage for later movement to Martins Creek, ConAgra elected to pursue another alternative. ConAgra arranged to obtain its wheat by purchase from two companies which operate elevators and maintain wheat storage at Buffalo.

Indeed, ConAgra indicated that these two companies " . . . were very eager to sell ConAgra wheat delivered in rail cars or trucks at Buffalo. . ." (Ex. 16, p. 10) That is the basis upon which ConAgra has been operating to date. (Ex. 16, p. 10) The record reveals that there are other companies with wheat storage at Buffalo who would also be willing to negotiate with ConAgra and supply it wheat for bakery flour. However, ConAgra has not seen fit to contact such companies. (Ex. 19, pp. 4-5; Ex. 18, pp. 2-3; Ex. 25, pp. 3, 4)

The record reveals that from May 1, 1973 through November 30, 1973 ConAgra received its wheat requirements from Buffalo via two routes. Sixty-eight percent of the wheat moved from Buffalo to Martins Creek via the Erie. Thirty-two percent of the wheat moved from Buffalo to Martins Creek via truckers, exempt from Interstate Commerce Commission regulation by virtue of the provisions of 203(b)(6) of the Interstate Commerce Act. (Ex. 16, p. 12; Ex. 23, pp. 5-6; Ex. 26, p. 5; R. 499, 744, 837, 838, 840)

Such wheat moved from Buffalo to Martins Creek via the Erie pursuant to a five car rate of 40¢ per cwt. (Ex. 16, pp. 12-13) This rate was published at the request of ConAgra, after withdrawal of the earlier annual volume rate which, as we have noted, had been suspended by the Commission, Division 2 in I.&S. No. 8784. (Ex. 1, p. 12)

The very essence of the tariff provisions under suspension is to divert the movement of wheat from Buffalo to Martins Creek to a movement via another route, i.e. through Chicago to Martins Creek. In consequence, the Erie is, in fact, engaged in competition with itself. It is seeking to displace the movement of wheat via the Erie from Buffalo to Martins Creek. Indeed, even that is not the end of the matter. The Erie is also seeking in effect to displace the movement of wheat via the Erie, during the non-navigation season under the unit train rate to Buffalo. (R. 54-55)

The point was made with compelling force by witness Scoggin when he testified:

> "One of the significant aspects of the present case is that in substance the Erie is competing against itself. The Erie has been moving wheat from Buffalo to Martins Creek under a 5-car rate of 40 cents per cwt. for a distance of approximately 350 miles. Under the protested rate the Erie would be transporting wheat for approximately 900 miles to the same destination for 47¢ per cwt. (65% division of suspended rate of 72.25 cents per cwt.) The Erie, in effect, is seeking to cut off its own transportation of wheat from Buffalo to Martins Creek." (Ex. 18, p. 8)

The disparity in the comparative distances via the Erie, and the compensation for transportation service, cited by witness Scoggin demonstrates the *per se* unreasonableness of the instant tariff provisions. At the very time when the Erie, in a bankruptcy proceeding, is struggling to remain a viable carrier the anomaly of the Erie competing against itself, contemplated under the suspended tariff provisions, violates Section 1(5) of the Interstate Commerce Act. *The Commission is requested so to find and conclude*.

### THE PROTESTED RATES MUST BE DISAPPROVED AS NOT SHOWN JUST AND REASONABLE AND OTHERWISE LAWFUL BECAUSE THEY WOULD, IF EFFECTIVE, NEEDLESSLY AND UNNECESSARILY DISSIPATE THE REVENUES OF THE ERIE LACKAWANNA CONTRARY TO SECTIONS 1(5), 1(6), AND 15a(2) OF THE INTERSTATE COMMERCE ACT AND THE NATIONAL TRANSPORTATION POLICY.

In approaching the fundamental issue of the lawfulness of the suspended rate proposal, the absolutely critical, if not dire, financial condition of the Erie is an omnipresent regulatory factor. As previously mentioned, the Erie is in a bankrupt status before the U.S. District Court for the Northern District of Ohio, Eastern Division, at Cleveland. The Commission will expectedly be highly sensitive to the impact of the suspended rates on the Erie's present and prospective financial condition. The most thorough and detailed examination is called for with respect to the justification for the Erie's managerial judgment. Indeed, extremely close investigation is warranted by the mere fact that the instant proposal is not compelled or justified from the Erie's standpoint by competition from competing modes. The Erie seeks basically to shift the handling of the same volume of traffic it has been handling from one of its routes, Buffalo-Martins Creek, to another, Chicago-Martins Creek. On its surface, the rate proposal is highly suspect in terms of its impact on the Erie's finances, since the Erie will be placed in competition with itself. Circumstances such as these led Division 2 to suspend the rate proposal placing it under a cloud of *prima facie* unlawfulness. 1/

There is yet an additional reason why this rate proposal must be approached with special thoroughness by the Commission. Other Official Territory railroads, including particularly the Penn Central, stand to be directly affected by the suspended tariff if it were permitted to become effective. The financial condition of the Erie and the other Official Territory railroads led to the enactment by the Congress of the Regional Rail Reorganization Act of 1973, P.L. 93-236. The instant proposal certainly cannot be viewed as routine or a mere matter of day-to-day managerial judgment on the part of the proponent carriers. Involved is the direct effect of the proposal on the very survival of the Erie and other Official Territory carriers.

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1/ An order of investigation and suspension carries with it a finding of *prima facie* unlawfulness. *Suspension Of Rates On Packing House Products*, 21 I.C.C. 68, 70 (1911); *Board Of Trade Of Chicago* v. *Illinois Central R. Co.*, 26 I.C.C. 545, 552 (1913)

## The General Principle That Railroad Divisions Are Not Pertinent To The Determination Of The Reasonableness Of Rates Has No Application In This Case.

These protestants are aware of the general principle to the effect that the level of divisions accruing to joint participants in a joint-through rail rate do not govern whether such rates are reasonable under the Interstate Commerce Act. However, the existence of that principle is no shield to the unlawfulness here present. The Erie's participation in the rate proposal must properly withstand independent analysis, particularly with respect to Section 15a(2) of the Act and the National Transportation Policy. The latter policy is to be expressly applied by the Commission in administering the various provisions of the Interstate Commerce Act. The National Transportation Policy mandates enforcement of the Act in a manner:

> ". . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices. . . ." 49 U.S.C. §§1 et seq.

Moreover, Section 15a(2) of Part I of the Act sets out regulatory principles requiring close examination of:

> ". . . the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." 49 U.S.C. §15a(2)

Not to be overlooked, of course, is the mandate that rates proposed by the carriers, and regulations and practices affecting such rates be just and reasonable in the context of Sections 1(5) and 1(6) of Part I of the Act.

The above regulatory standards cannot be lightly dismissed as inapplicable simply on the basis that divisions are not normally a conclusive benchmark of the reasonableness of the rates on which the division are based.

Without a close examination of the divisions accruing to the Erie, as compared to the cost to it of providing the proposed service, there would be no effective or appropriate means to determine the effect of the proposed rates on the Erie's net revenues and hence its financial condition. The result would be to emasculate the protections of the Interstate Commerce Act.

The cost of providing service as compared with the division of the revenue accruing to the participating carrier is directly relevant in applying the rule of ratemaking standards of Section 15a(2). Chicago B. & Q. R. Co. v. Chicago & E. I. R. Co., 310 I.C.C. 349, 351 (1960).

The economic condition of the carrier proponent and the prospective impact of a rate proposal are critical elements to be considered by the Commission in determining reasonableness under Section 1 of the Act. Covey Ballard Motor Co. v. Alton & S. R., 174 I.C.C. 674, 682 (1931); Barton Auto Co., Inc. v. Ann Arbor Co., 234 I.C.C. 775, 786 (1939). Further, and directly related to this principle, is the matter of whether or not a carrier will dissipate its net revenues by publishing or participating in reduced rates. A key determination with respect to Sections 1(5), 15a(2) and the overall National Transportation Policy is whether the carrier would be better off "without the rate than with it." North Carolina Corp. Comm. v. Akron, C. & Y. Ry. Co., 213 I.C.C. 259, 288 (1935); All Freight To Pacific Coast, 238 I.C.C. 327, 332 (1940); Alden Coal Co. v. Central R. Co. of New Jersey, 256 I.C.C. 401, 419 (1943); New Automobiles in Interstate Commerce, 259 I.C.C. 475, 534 (1945); Tractors - T. L. & W. T. L. Territories to S. W. & W. T. L. Ter., 319 I.C.C. 758, 765 (1963)

To ignore the level of the divisions to accrue to the Erie under the suspended rates would be to ignore the effect of such rates on the Erie's financial condition. This would be directly contrary to the important regulatory principles set out in the above decisions and would undermine the objectives of Sections 1(5), 15a(2) of the Act, and the National Transportation Policy. We are confident that the Commission will heed these important principles and objectives by carefully examining the matter of divisions under proposed rates.

The Erie has in effect admitted the direct relevance of divisions in this case. As part of its effort to meet its substantive burden of proof, the Erie voluntarily supplied for the record direct, affirmative evidence on the level of the divisions to apply under the protested rates. (Ex. 5, pp. 9-10, App. C) 2/

It is important also to bear in mind that the issue in this case is not simply whether local rates between two points are lawful as compared to the level of the divisions between those points. Rather, the issue here is whether the Erie is needlessly dissipating its revenues by seeking to shift traffic which it has been handling from Buffalo to Martins Creek, for a distance of approximately 340 miles, to an uneconomic, unfeasible unit train operation from a different point, Chicago, to Martins Creek, for a distance in

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2/ The Erie conceded the relevance of divisions by offering evidence thereof in connection with its case in chief.

excess of 900 miles. 3/ Under these circumstances, evidence of divisions is extremely important in determining the lawfulness of the proposed rates.

### Protestants' Expert Analysis Of Operations And Costs Demonstrates That The Protested Rates Would, If Effective, Result In A Needless Dissipation Of The Erie's Net Revenues.

At the very heart of the issue of lawfulness here before the Commission is whether the protested rates will improve or injure the Erie's net revenue position. That position is of continuing concern to these protestants who must continue to rely upon the Erie and other Official Territory railroads for important rail service in the movement of flour from Buffalo mills and Chicago interchange connections to marketing points in the east. Naturally, these protestants are alert to any efforts by the Erie or other railroads which would have the effect of further endangering the viability of the eastern railroad structure.

Accordingly, when confronted with the instant rate proposal, these protestants retained Mr. Eugene F. Bilz, a nationally recognized and prominent transportation cost consultant to evaluate the impact of the rate proposal.

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3/ Erie road-haul mileage from Buffalo to Martins Creek is 341 miles. Erie road-haul mileage from Chicago to Martins Creek is 910 miles. (Ex. 31, pp. 17, 39)

Witness Bilz' 19 years of transportation cost experience includes the preparation of many cost and economic studies dealing with rail, motor carrier and water carrier operations. These studies embrace nearly all areas of the United States and were prepared on behalf of carriers, state and federal agencies, individual shippers and shipper associations. Witness Bilz has appeared before this Commission many times as a witness in proceedings dealing with transportation costs and economic issues. He has had extensive and broad ranging experience in dealing with Rail Form A and its application. (Ex. 31, pp. 1-2)

Witness Bilz submitted detailed and thorough evidence dealing with the transportation cost and operating aspects of the protested rates. In this connection, he reviewed the cost, operating, and revenue data submitted by Erie witnesses Barber, Cannon and McGinnis. He also conducted an on-the-ground inspection of the rail facilities at Martins Creek and inspected underlying work papers of the Erie at its offices in Cleveland. (Ex. 31, pp. 2-3)

In his initial evidence, witness Bilz determined from information known and available to him the variable and fully-allocated costs, and contribution to overhead burden, applicable to rail movements under (1) the Erie's existing five car rate from Buffalo to Martins Creek and (2) the Erie's proposed unit train operation from Chicago to Martins Creek. The ratios of the present five car rate to the costs applicable to the movement, both variable and fully-allocated, were also developed. These were compared with the ratios of the Erie's division under the proposed unit train rates to the costs applicable to the Erie's projected movement from Chicago to Martins Creek (Ex. 31, pp. 11-22)

In developing comparative revenue contribution data, witness Bilz utilized two bases. Basis A developed the annual contribution to be derived if the 72.25¢ rate were utilized for the movement of all of ConAgra's wheat. Basis B assumed that the 72.25¢ rate would be used to move 85 percent of the annual wheat volume to Martins Creek, with the 88¢ rate, applicable during the winter months, utilized to move the remaining 15 percent. 4/ In witness Bilz' expert opinion, these two ranges would define the realistic combinations possible under the proposed rates. (Ex. 31, pp. 11-12) Also, the revenue and cost comparisons were shown separately for movements in railroad and shipper-owned covered hopper equipment. The results of witness Bilz' analysis of the rail revenue contribution to be earned by the Erie under the proposed unit train rates versus that

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4/ In effect, such a combination would result in a weighted average rate of 74.61¢ for year-round operations. (Ex. 31, p. 12) The 85-15 percentage split was used by the Erie also. (Ex. 5, App. C) being earned and available under the existing five car rate from Buffalo are set out in the following Table No. 1.

## Table No. 1

### COMPARISON OF THE RAIL REVENUE CONTRIBUTION EARNED BY THE ERIE-LACKAWANNA RY. IN TRANSPORTING WHEAT TO MARTINS CREEK, PA. AT THE PRESENT MULTIPLE-CAR RATE FROM BUFFALO AND AT PROPOSED UNIT TRAIN RATES.

| Line No. | ITEM (1) | Movements Under Present Multiple Car Rates From Buffalo to Martins Creek: In E-L Cars (2) | Movements Under Present Multiple Car Rates From Buffalo to Martins Creek: In Shipper Cars (3) | Movements at Proposed Unit Train Rate to Martins Creek, Pa.: In Soo Line Cars (4) | Movements at Proposed Unit Train Rate to Martins Creek, Pa.: In Shipper Cars (5) |
|---|---|---|---|---|---|
| | A. Based On Unit Train Rate of 72.25¢ 1/ | | | | |
| 1 | Erie-Lackawanna Revenue Per Cwt. | 40.0¢ | 40.0¢ | 2/ 47.0¢ | 2/ 47.0¢ |
| 2 | Variable Cost Per Cwt. | 16.5 | 14.4 | 27.5 | 28.9 |
| 3 | Revenue Contribution Per Cwt.(L.1–L.2) | 23.5 | 25.6 | 19.5 | 18.1 |
| | Annual Volume of Wheat to Martins Creek | | | | |
| 4 | Total Cwt. 3/ | 1,428,000 | 1,428,000 | 1,428,000 | 1,428,000 |
| 5 | Total Revenue Contribution (L.3 X L.4) | $ 335,580 | $ 365,568 | $ 278,460 | $ 258,468 |
| | Reduction of Rev. Contribution at Proposed Rates | | | | |
| 6 | Compared With Col. 2 Contribution | xxx | xxx | 57,120 | 77,112 |
| 7 | " " Col. 3 " | xxx | xxx | 87,108 | 107,100 |
| | B. Based On Average Rate of 74.61¢ (85% at 72.25¢; 15% at 88¢) | | | | |
| 8 | Erie-Lackawanna Revenue Per Cwt. | 40.0¢ | 40.0¢ | 2/ 48.5¢ | 2/ 48.5¢ |
| 9 | Rev. Contribution Per Cwt. (L.8–L.2) | 23.5 | 25.6 | 21.0 | 19.6 |
| 10 | Total Rev. Contribution (L.4 X L.9) | $ 335,580 | $ 365,568 | $ 299,880 | $ 279,888 |
| | Reduction of Rev. Contribution at Proposed Rates | | | | |
| 11 | Compared with Col. 2 Contribution | xxx | xxx | $ 35,700 | $ 55,692 |
| 12 | " " Col. 3 " | xxx | xxx | 65,688 | 85,680 |

Source: Costs from Tables 2 and 3

1/ Proposed rate applicable during period from April 1 through December 14.

2/ Erie-Lackawanna revenue from unit train rate based on a 65% division of through rate.

3/ Annual volume based on rail transportation of 68% of assumed annual wheat requirement of 2,100,000 cwt. at Martins Creek (Witness Barber, Appendix C).

Source: Ex. 31, p. 16, Table 1, Sheet 1.

As seen from Table No. 1, under the present multiple-car rate from Buffalo, the Erie accrues a revenue contribution (e.g. the difference between the variable cost and revenue per cwt.) of 23.5 and 25.6¢ per cwt., respectively, for shipments in railroad-owned or shipper-owned cars. The comparable revenue contribution data for operations under the proposed unit train rates are 19.5¢ and 18.1¢ under Basis A and 21.0 and 19.6¢ under Basis B. In summing up the impact of the proposed rates on the Erie, witness Bilz pointed out:

> "Thus, my study shows that the multiple-car rates produce from 2.5¢ to 7.5¢ greater contribution per cwt. than would be derived under the proposed unit train rates. Stated differently, there will be a diminution of revenue contribution of from 2.5 to 7.5¢ under the unit train rates. On an annual basis, reflecting the movement of 1,428,000 cwt. as explained above, the revenue diminution would amount to from $35,700 to $107,100." (Ex. 31, p. 12)

Following receipt of witness Bilz' evidence, the Erie substantially changed its position with respect to its proposed operations under the unit train rate. This was revealed in supplementary oral testimony by the Erie's operating witness, Mr. McGinnis. (R. 124-126) Among such changes was the addition of a new crew from Croxton, New Jersey which would have to dead-head 5/ approximately 160

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5/ "Dead-heading" involves the movement of a railroad crew to a point to commence work or from a point to their home base after work has been completed. Movement can be by "light" engine, not under load, passenger trains, bus or private automobile. (R. 106, 193, 877-8) miles in order to handle split unit trains to Martins Creek. This additional dead-heading expense would add approximately .45¢ per cwt. to witness Bilz' variable costs under the unit train operation. (R. 1073) The effect would be to increase the variable costs on the unit train operation and, accordingly, reduce the contribution to overhead burden under the protested rates. (R. 1074) Under witness Bilz's analysis, this would mean that the revenue contribution shown for operations under the proposed rates would become 19.0¢ and 17.6¢ under Basis A, and 20.5¢ and 19.1¢ under Basis B. This, in turn, results in a diminution of revenue contribution ranging from 3.0 to 8.0¢ under the protested unit train rates. On an annual basis, diminished revenue contribution would range from approximately a minimum of $42,700 to $114,100. (R. 1090, 1095)

The above showing is conservative. It is predicated on an assumed annual grind of 2,100,000 cwt. of wheat at Martins Creek and rail transportation of 68 percent of this annual volume. If the requirements at Martins Creek exceed 2,100,000, this increase in volume would add to the diminution of revenue contribution under the protested unit train rates. (Ex. 31, p. 13)

Witness Bilz also developed the ratio of rate to costs for the present Erie five car rate from Buffalo to Martins Creek and the ratio of the Erie division to costs for movements via the Erie from Chicago to Martins Creek under the protested unit train rates. The rate-cost ratios under the existing Buffalo five car rate are summarized below in Table No. 2.

Table No. 2

Ratios Of Rate To Costs Under Present
Five Car Rate, Buffalo To Martins Creek

| | Erie Cars | Shipper Cars |
|---|---|---|
| Rate (per cwt.) | 40.0¢ | 40.0¢ |
| Ratio-Rate To Costs | | |
| Variable | 242% | 278% |
| Fully-Allocated | 173% | 190% |

Source: Ex. 31, p. 17, Table 2, Sheet 1

As seen from Table No. 2, *supra*, the existing five car rate provides substantial margins above both variable and fully-allocated costs. At a minimum, in Erie cars, such movements return 242% of variable costs and 173% of fully-allocated costs. It is immediately apparent that the existing five car rates are a valuable source of significant net revenue to the Erie.

In contrast, the protested rates involve lower margins above costs for the Erie. The ratios of division to costs for the Erie, as initially developed by witness Bilz, are summarized below in Table No. 3.

## Table No. 3

### Ratios Of Division To Costs Under Protested Unit Train Rates, Chicago Interchange To Martins Creek.

| | Soo Cars | Shipper Cars |
|---|---|---|
| | 46.96¢ | 46.96¢ |
| El Division | | |
| Ratio-El Division To Costs | | |
| Variable | 171% | 162% |
| Fully-Allocated | 119% | 115% |

Source: Ex. 31, p. 19, Table 3, Sheet 1.

The ratios above must approximately be adjusted to reflect, at a minimum, the added costs imputed to Croxton dead-heading involved in the Erie's mid-hearing revision of its planned unit train operations. These adjustments are reflected below in Table No. 4.

## Table No. 4

### Revised Ratios Of Division To Costs Under Protested Unit Train Rates, Chicago Interchange To Martins Creek.

| | Soo Cars | Shipper Cars |
|---|---|---|
| | 46.96¢ | 46.96¢ |
| El Division | | |
| Ratio-El Division To Costs | | |
| Variable | 168% | 160% |
| Fully-Allocated | 118% | 114% |

Source: Ex. 31, p. 19, Table 3, Sheet 1, revised on basis of additional .5¢ per cwt. variable cost for Croxton dead-heading. (R. 1073)

As demonstrated by Table No 4, supra, for movements solely in railroad cars 6/, the ratios of division to costs, variable and fully-allocated, are 168% and 118% respectively. Under the existing five car rate published by the Erie, on movements in Erie cars, the ratios of rate to costs, variable and fully-allocated, are 242% and 173% respectively. Put simply, the Erie's margin above variable cost is 74% higher under the existing five car rate than under the protested rates. The Erie enjoys a margin above fully-allocated cost 55% greater under the five car rate than under the protested rates. (See Table Nos. 2 and 4, supra)

As witness Bilz emphasized during cross-examination, the five car rate is "considerably more compensatory" than the protested unit train rate. (R. 1079)

Witness Bilz' analysis was based on detailed, and precise costing where known factors were available and/or provided by the Erie. (Ex. 31, pp. 23-44) His costs for unit train operation are conservative and probably understated. Even after recognition is afforded Croxton deadheading 7/, it must be recognized that witness Bilz had

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6/ Although the protested tariff allows movement in shipper cars with payment of mileage allowances, respondents claim most shipments will occur in Soo cars.

7/ Necessitated by mid-hearing revision by the Erie in its proposed unit train operations.

available only Rail Form A data on locomotive unit costs with respect to the proposed unit train operation. This results in an understatement of the locomotive portion of gross ton-mile costs. In his direct evidence, witness Bilz pointed out that the unit costs are understated where actual operations involve use of two 3600 horsepower locomotives, or three or four smaller units. Witness Bilz explained:

> "I should point out that, while I have employed the number of locomotive units projected by the Erie-Lackawanna for the Chicago to Scranton segment, I believe that the use of such figures results in an understatement of the cost. The reason for the understatement is that the costs developed by means of Rail Form A are not adjusted to reflect the greater costs associated with newer, more-powerful locomotive units; thus, two new 3,600 h.p. units are assigned the same cost as two older units of, say, 1,500 h.p. If the Erie-Lackawanna were to use some of its smaller locomotive units on the unit trains, at least three or four units would be required. If this is the case, the locomotive expense portion of the gross ton-mile costs would be twice as high as the costs developed in my study." (Ex. 31, p. 39)

3600 horsepower locomotives are the largest, most powerful, and most expensive in the Erie system. 8/ (R. 145-6; Ex. 36) The Erie's proposed unit train operation, calls for extensive use of 3600 horsepower locomotives and use of three 2500 horsepower units between Scranton

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8/ 3600 H.P. locomotives acquired by the Erie from 1967-1972 range in weight from 388,500 to 392,800 lbs. and cost from $285,200 to $337,600. (Ex. 36) and Portland. Locomotive unit use would be as described in Table No. 5 below.

### Table No. 5

### Erie Use Of Locomotive Units From Chicago To Martins Creek.

| From | To | Distance (Miles) | Locomotives |
|---|---|---|---|
| Chicago, Ill. | Marion, O. | 264 | 2 3600 H.P. units |
| Marion, O. | Kent, O. | 113 | 3 3600 H.P. units 9/ |
| Kent, O. | Scranton, Pa. | 458 | 2 3600 H.P. units |
| Scranton, Pa. | Portland, Pa. | 61 | 3 2500 H.P. units |
| Portland, Pa. | Martins Creek, Pa. | 14 | 2 2500 H.P. units |
| | | 910 | |

Source: Ex. 3, p. 5; Ex. 14; R. 125-6, 155, 158-9

As seen from the above Table No. 5, two 3600 horsepower units would be used for 722 miles. Three such highly expensive units 10/ would be used for 113 miles, and 3 smaller 2500 horsepower units would be used for 61 miles.

This proposed use of locomotive power, as described in Table No. 5, *supra*, would obviously increase the Erie's

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9/ The third 3600 H.P. unit would be added at Marion, used as power from Marion to Kent, but would not be removed from the train until Meadville, 90 miles beyond Kent. (R. 155)

10/ Erie witness Cannon admitted the Rail Form A locomotive costs understate fuel and capital costs per running mile for 3600 horsepower locomotives. (R. 377-8) variable and fully-allocated costs under the protested unit train rates, and would further reduce the contribution under such rates. If actual locomotive costs per gross ton mile were applied, the result would be (1) lower contribution under the protested rates and lower ratios of division to cost, and (2) an even greater margin of difference between these factors and those pertaining to the five car rate. Accordingly, there is basis for concluding that the five car rate is more compensatory than the unit train rates by even wider margins than those precisely shown in witness Bilz' evidence.

Witness Bilz' operating analysis of operations and costs applicable to the protested rates do not stand alone in the record. The operating peculiarities of the protested unit train service as described by witness Bilz are very similar to the same problems outlined by witness William Wulfhorst, Manager, Service Planning, of the Penn Central. (Ex. 24; R. 861-884)

In singular recognition of its faulty planning and ill-advised participation in the protested rates, the Erie fundamentally altered its proposed method of operating under the unit train rates after receipt and review of witness

Bilz' evidence and the operating evidence initially submitted by witness Wulfhorst. During the course of hearings, the Erie's operating witness McGinnis offered a new, radically changed version of unit train operations under the protested rates from Scranton to Martins Creek. This change in operations conformed largely to the operating pattern described by witness Bilz as necessary in his direct evidence. (Ex. 14; Ex. 31, pp. 31-38; R. 124-126) Indeed, during cross-examination, witness McGinnis admitted that the Erie's operating changes were based in part on witness Bilz' direct evidence. (R. 125-6) 11/

Also of significance is the fact that the Erie's own cost studies demonstrated that the present five car rate returns greater contribution to the Erie than would the present unit train rates. (Es. 8-11)

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11/ Witness McGinnis also stated that these changes were partly necessitated by the Erie's belated recognition that its original version of operations was, in effect, Utopian and could not be realized at this time. (R. 125-6)

The variable costs computed by the Erie, both initially and as revised, and the resulting contribution, are summarized below in Table No. 6.

### Table No. 6

### Variable Costs Assigned By The Erie To Protested Unit Train Movements And Resultant Contribution

| | Initial | Revised |
|---|---|---|
| Five car rate | | |
| Rate | 40.00¢ | 40.00¢ |
| Variable Cost | 17.58 | 17.44 |
| Contribution | 22.42¢ | 22.56¢ |
| Unit Train Rate | | |
| El Division of 72.25¢ Rate | 46.96¢ | 46.96¢ |
| Variable Cost | 25.48 | 26.96 |
| Contribution | 21.58¢ | 19.99¢ |

Source: Ex. 31, pp. 5-6, 19; Exs. 8-11.

The effect of the Erie's mid-hearing cost revisions was to raise its showing of variable costs on the unit train rate movements and to lower its showing of costs on movements under the five car rate. This increased the contribution accruing under the present five car rate and decreased the contribution that would accrue under the protested rates. (R. 358) This is shown by Table No. 6, supra. The revisions in variable cost also brought to Eric's showing closer to the analysis developed by witness Bilz. 12/

Thus, by its own showing, particularly as revised, the Erie concedes that the present five car rates are more compensatory than the divisions which would accrue to it under the protested rates. The Erie's cost evidence, in effect, confirms witness Bil'z analysis and demonstrates that the proposed rates would result in a depletion in the Erie's net revenues. Even the Erie's cost data, which we do not concede are correct, demonstrate that, under the protested 72.25¢ rate, the Erie stands to lose at a minimum, 3¢ per cwt. in revenue on each carload of wheat handled fro ConAgra's Martins Creek facility, or, approximately, a loss of $60.00 per car in net revenue. 13/ ?

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12/ The Erie's cost data presupposed exclusive use of railroad equipment, Erie cars under the five car rate and Soo cars under the proposed unit train rates. As revised, the Erie's variable costs, respectively, for the five car rate and the unit train rates were at the level of 17.44¢ per cwt. and 26.99¢ per cwt. See Table No. 6, supra. The variable costs as developed by witness Bilz, covering movement in railroad hopper cars, showed variable costs, respectively, for movements under the five car rate and the protested unit train rates of 16.5¢ per cwt. and 28.0¢ per cwt. (See Ex. 31, p. 6; R. 1073)

13/ As indicated in Table No. 6, the per cwt. contribution now returned by the five car rate is nearly 3¢ per cwt. higher than contribution to accrue to the Erie under its share of the division applicable with respect to the proposed 72.25¢ rate, assuming the Erie's cost data were accurate, which we do not concede.

In connection with the Erie's cost data, it is again important to note that the variable costs utilized by the Erie for operations under the protested unit train rates are understated by exclusion of actual and realistic per gross ton-mile costs for the use of two to three 3600 horsepower locomotive units for approximately 800 miles of the line-haul movement between Chicago and Scranton. The Erie's cost witness expressly admitted that Rail Form A locomotive costs understate the higher costs associated with the use of 3600 horsepower locomotives, which are the largest, most powerful, and most expensive motive units in the Erie system. (R. 377-369; Ex. 31, p. 39; Ex. 36) These costs are also understated in their failure to take into account precisely the higher costs associated with the Erie's proposed use of three 2500 horsepower locomotive units from Scranton to Portland, a distance of about 60 miles (See Table No. 5, supra) 14/

During cross-examination, the Erie witnesses Cannon and MiGinnis essentially conceded that their original operating and cost assumptions were basically defective with respect to the proposed unit train service. They

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14/ Additional locomotive costs were also not included in witness Bilz's study. However, witness Bilz was not in a position to have access directly to Erie costs in this regard. The Erie, which could have submitted such costs, failed to do so, resting its showing exclusively on its Rail Form A system average costs.

admitted that they had both indulged in mistaken assumptions and had misinterpreted one another's data and assumptions (R. 125-127, 367, 368, 373, 394)

At one point, witness Cannon explicitly admitted that his failure to include one important item of operating cost concerning proposed handling at Portland was an "oversight". (R. 394)

Witness Bilz' operating and cost analysis constitutes the most reliable and most superior evidence of record on the issue of the impact of the protested rates on the Erie. The Commission is requested so to find.

### There Is Absolutely No Justification For The Erie's Assumption That, Notwithstanding The Higher Contribution Per Cwt. Accruing Under Buffalo Five Car Rate, The Protested Unit Train Rates Will Improve The Eries' Net Revenues.

Witness Bilz' analysis conclusively demonstrates that the Erie would seriously diminish its net revenues under the protested rates. For every cwt. of wheat handled under the protested rates, the Erie would diminish its net revenues at a minimum from 3 to 8¢ per rail carload of what. This would be a diminution of approximately from $60 to $160 in revenues per carload. 15/ Annually, revenue

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15/ Based on an average load per car of 100 tons. (See Ex. 31, p. 43) diminution would range from at least $42,000 to over $114,000. (Ex. 31, p. 16; R. 1073, 1090) These amounts of revenue diminution are conservatively based on annual rail wheat tonnage of 1,428,000 cwts. Greater diminution would occur for the Erie if respondents, in the face of itinerant truck competition, handled less tonnage under the protested rates. Such a possibility is by no means remote in view of the exempt truck competition confronted by the respondents.

The Erie, without the slightest justification, has predicated its net revenue showing upon the fallacious assumption that it will handle 100 percent of ConAgra's annual wheat requirements if the unit train rates were permitted to become effective. (Ex. 5, Apps. C, D) Witness Bilz employed a realistic factor of 1,428,000 cwts. of wheat. The Erie inflated the annual tonnage to move under the protested rates to the level of 2,100,000 cwts. The result of such a statistical exercise by the Erie, which can only be characterized as abracadabra, is to show a net revenue gain to the Erie under the protested rates, notwithstanding the lower per cwt. contribution accruing under those rates, compared to the five car rate, as conceded by the Erie and as more accurately shown by witness Bilz.

The protested unit train rates were not designed or published to protect the Erie from water or truck competition. These rates are designed strictly to meet and only meet existing water-rail and all-rail transportation alternatives available to ConAgra. The respondents have been emphatic in making this point. (Ex. 1, pp. 12-13; Ex. 5, p. 6; R. 34) The respondents expressly pointed out that they did not base the level of the protested rates on the cost to ConAgra of itinerant trucking from Buffalo to Martins Creek. (R. 41) Unregulated truckers have successfully handled 32 percent of ConAgra's wheat requirements. (Ex. 16, p. 12) If the protested rate became effective, those truckers would continue to face the same level of rail competition. (R. 235) The total transportation charges available to ConAgra to move wheat from either Duluth by water-truck via Buffalo to Martins Creek, or from Minneapolis-St. Paul by rail-truck via Buffalo would still be lower than the level of the protested all-rail unit train rates. (Ex. 21, pp. 9-10)

As an expert in transportation matters of national statute, witness Bilz was in an excellent position to assess the reliability of the Erie's assumption that it would increase its share of ConAgra traffic from 68 percent to 100 percent if the protested rates became effective. Having reviewed the evidence in detail, having visited the facilities at Martins Creek, and having been involved in prior cases involving rail and truck alternatives, witness Bilz spoke with considerable experience and authority in concluding:

> "In my opinion, with the existence of lower costs via the water-truck and rail-truck routes, there is no reason to believe that the rail unit train portion of the total wheat movement to Martins Creek would be any greater than the 68 percent portion presently moved under the multiple-car rates." (Ex. 31, p. 9)

Witness Bilz correctly utilized the known factor of 68 percent with respect to the anticipated percentage of ConAgra's annual volume to be moved under the proposed unit train rates. That factor is based on the only evidence submitted by ConAgra on the matter of volume. In view of the Erie's extremely dire financial condition, this carrier should not be permitted the luxury of indulging in the unfounded assumption that the protested unit train rates will increase its share of wheat moving to Martins Creek to 100 percent of ConAgra's annual requirements. Such "Brinksmanship" should not be permitted particularly where the Erie is already in a position to handle ConAgra's requirements under its existing five car rate which moves such traffic at handsome margins above both variable and fully-allocated costs. 16/

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16/ Also, as we have stressed, if the Erie had a real basis for its 100 percent assumption, the proposed rates would be unlawful in another respect as an unlawful annual volume arrangement based on exclusive patronage.

Both the Erie and the Soo have expressly admitted that they have no commitment from ConAgra to move one pound of wheat under the protested rates. (R.36, 235-6) The lack of any commitment was confirmed by ConAgra's evidence which demonstrates (1) that ConAgra is seeking an additional transportation option or alternative with respect to the protested rates, (2) that ConAgra does not view itself as locked-in or committed to use the protested rates, and (3) that ConAgra has employed itinerant truck transportation to move 32 percent of its wheat requirements from May to November of 1973 at costs per cwt. from about 3 to 7¢ lower than the Erie's five car rail rate from Buffalo. (Ex. 16, pp. 10, 12, 20; R. 493)

Experienced traffic executives testifying on behalf of these protestants pointed out emphatically that, based on their considerable experience in transportation by truck versus rail, ConAgra will not ignore the substantial cost savings available to it through the use of water/itinerant truck and rail/itinerant truck via Buffalo.

Witness Woolery, Assistant Vice President - Traffic of ADM Milling Company, put the matter in proper focus when he testified:

> "Even if the protested rates were effective, ConAgra would continue to have an incentive to rely on itinerant truck movement of wheat via Buffalo to Martins Creek. Further, trucking from Buffalo saves

> ConAgra the added cost of trucking rail arrived wheat from the Martins Creek elevator ("B" plant) to the Sandts Eddy mill. ("A" plant) This factor, according to Witness Stone, is 2¢ per cwt. In its Petition for Reconsideration of the suspension Order in this proceeding (page 10), ConAgra indicated that its volume of traffic moved by exempt truck between Buffalo and Martins Creek 'is limited only by the capacity of the available exempt truckers'.
>
> Use of exempt truck transportation for inbound receipt of wheat is a fact of life in milling operations. I do not believe ConAgra will forego the transportation cost advantages of such movements in favor of exclusive use of the protested rates." (Ex. 20, p. 8)

Similar evidence was presented by witnesses Hackbart and Goble of Pillsbury and witness Kucharo of Ross Industries, all of whom testified, based on their transportation experience, ConAgra can be expected to rely on itinerant truckers for the movement of significant quantities of wheat from Buffalo to Martins Creek. (Ex. 21, pp. 7-10; Ex. 23, pp. 5-6; Ex. 26, pp. 4-5)

Furthermore, as the record indicates, itinerant, exempt truckers have considerable flexibility in pricing their transportation service. They are in a position to, and in fact do, adjust their charges in order to meet regulated rail transportation. (Ex. 23, p. 6; R. 41, 45-6, 233-4) ConAgra's choice of transportation options involves cost considerations down to a cent a cwt. (R. 1122) ConAgra found itinerant truck service to be both adequate and sufficiently economical to warrant this method of handling 32 percent of its Martins Creek wheat requirements prior to the publication of the protested rates. By truck delivery, ConAgra also avoids the 2¢ transfer charge to move rail delivered wheat from its storage elevator at Martins Creek to the flour mill. (Ex. 20, p. 8; R. 43)

As an intervenor in support of respondents, ConAgra shares respondents' burden of proof as to the lawfunless of the suspended rate. Moreover, ConAgra presumably had facts or knowledge peculiarly within its possession and control on the issue of volume of wheat by mode to move to Martins Creek. Being exclusively in command of such information, ConAgra had the "burden of adducing the pertinent information." International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 643 (1973); See also G.E.J. Corporation v. Uranium Aire Co., 311 F.2d 749, 751 (1962).

The record is devoid of substantial and probative evidence by ConAgra that it will move above 68 percent of its Martins Creek wheat requirements via the protested rates if they are permitted to become effective. (Exs. 16, 33; R. 484-544, 1103-1166) Faced with these protestants' direct evidence, referred to above, on the matter of volume reasonably expected to move to Martins Creek, ConAgra failed to rebut such evidence. The only reasonable inference is that the protested rates would permit the Erie to continue to share in at most 68 percent of ConAgra's wheat movements to Martins Creek.

Witness Bilz' analysis, predicated on the only reasonable factor of record with respect to annual rail volume, 68 percent, establishes that the Erie stands to dissipate needlessly its revenue to the extent of from at least $42,000 to over $114,000 per year if the protested rates become effective. The Erie's cost data shows the present five car rates to be more compensatory than the protested unit train rates. According to the Erie's costs, which we do not concede are correct, annual diminution in Erie net revenue will occur if, as will be the case, basically the same volume of tonnage is shifted from handling under the five car rate to the protested unit train rates. As demonstrated by the Erie's own cost analysis, the Erie will be better off without the protested rates than with them if the Erie continues to handle 68 percent of ConAgra's Martins Creek wheat requirements. (Exs.10, 11)

There is another aspect to the Erie's depletion of its net revenue under the protested rates. The record demonstrates that the Erie has handled and is handling unit train movements of wheat from Duluth-Superior and Minneapolis-St. Paul to Buffalo. During 1972-1973, the Erie handled ten such trains. (Ex. 3, p. 4) According to the Erie's witness McGinnis, the Erie has handled four or five such unit train movement already during this winter season. (R. 130) Under the protested rates, the Erie will lose that unit train revenue, in addition to its five car revenue, to the extent such wheat moves to Martins Creek from Buffalo. Respondents provided no evidence of the amount of wheat now carried under the existing Buffalo unit train rate which is carried beyond Buffalo to Martins Creek. However, we would point out that protestants' analysis submitted through witness Bilz demonstrated a serious diminution in Erie net revenue without including consideration of this added factor.

## The Erie Would Have To Be Successful In Handling Substantially More Than 68 Percent Of Yearly Wheat Moving To Martins Creek To Break Even Under The Protested Rates As Opposed To The Five Car Rates.

We have demonstrated that on every hundredweight of wheat handled by the Erie, under the unit train rates, its revenue would be needlessly diminished. We have demonstrated the fact of truck competition which will remain as an active deterrant to the Erie's hope to obtain 100% of annual wheat moving to Martins Creek. We have demonstrated that the only reasonable conclusion is that the Erie would handle no more than 68% of this annual movement, or 1,428,000 cwts.

Even if the Erie did obtain some additional wheat traffic, which we submit will not occur, the Erie would still be better off without the protested rates than with them. To break even with the revenue contribution under the existing five car rate, the Erie would have to handle at least from 78 percent to 84 percent of ConAgra's total annual wheat requirements at Martins Creek. It would have to obtain substantial increases in rail volume above 1,428,000 cwts. (68 percent), increases ranging from 15 percent to 24 percent. 17/ The details of this analysis, based on witness Bilz' evidence, are set out in Attachment No. 2 hereto. This would only bring the Erie to the point where it could equal the revenue contribution produced by the five car rate. Involved, of course, would be additional work, use of special crews and high cost locomotives, etc. simply to raise the Erie back to the level of contribution already returned under the five car rate without the additional

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17/ The Erie would have to handle at a minimum from 209,000 to 338,000 additional cwts. above the annual volume of 1,428,000 cwts., increases of 15 percent and 24 percent, respectively. See Attachment No. 2.

work, special crews, use of high cost locomotives, etc. Even at that point, the Erie would be far removed from improving its net revenue position.

For the Erie to improve its net revenue would require such a high percentage of ConAgra's wheat needs as to (1) be not feasible in view of exempt truck competition, and (2) violate otherwise the Act and the National Transportation Policy by constituting an exclusive patronage agreement.

The Erie will not and cannot improve its financial position under the protested rates whether or not it might conceivably, which we do not concede, attract more than 68 percent of ConAgra's annual wheat tonnage moving to Martins Creek.

### In View Of The Substantial And Probative Evidence Of Record Demonstrating The Erie's Revenue Dissipation Under The Protested Unit Train Rates, The Absence Of Any Reasonable Prospect Of Any Significant Increase In Traffic Volume For The Erie Under The Protested Rates, And The Erie's Dire Financial Condition, The Commission Must Disapprove The Protested Rates As Violative Of Sections 1(5), 1(6) And 15a(2) Of The Interstate Commerce Act, And The National Transportation Policy.

We have streesed earlier the need for specific consideration of the financial condition of the Erie in reaching any determination as to the lawfulness of the protested rates. This factor is an important consideration with respect to the standards of lawfulness of Sections 1(5) and 15a(2), as administered through the mandatory principles set out in the National Transportation Policy.

We have also demonstrated that the Erie stands to dissipate its net revenue both needlessly and seriously under the protested rates. We have shown that the Erie's forecast that the protested rates would result in its handling 100 percent of ConAgra's wheat requirements at Martins Creek is absolutely without any foundation. We have shown that there is no reasonable prospect for the Erie to handle any greater percentage of ConAgra's wheat other than the 68 percent which it handled prior to publication of the protested rates. We have shown that the Erie would have to handle substantially above 68 percent just to break even with the revenue contribution earned under its existing five car rate. We have emphasized the Erie's extremely dire financial condition and its presently bankrupt status.

Under all of these circumstances, including the respondents' failure to sustain their burden of proof, the Commission must find and conclude that protested rates have not been shown just and reasonable or otherwise lawful. The establishment of lower rates must be disapproved where there is no indication of a net gain in tonnage and revenues to the carriers and the establishment of such lower rates would result only in a needless dissipation of revenues, accompanied by a likely increase in the burden on other traffic. Alden Coal Co. v. Central R. Co. of New Jersey, 256 I.C.C. 401, 419-420 (1943); Phosphate Rock, Points In Florida to Virginia, 313 I.C.C. 495, 500-501 (1961), affirmed Atlantic Coast Line Railroad Co. v. United States, 209 F.Supp. 157 (1962); Tractors, T. L. & W. T. L. Territories to S. W. & W. T. L. Ter., 319 I.C.C. 758, 765-766 (1963); Motor Vehicles, Kansas City, Mo. to Southwest, 332 I.C.C. 615, 625 (1968); see also I&S Docket No. 8777, Freight All Kinds, Between Illinois & New Jersey, Initial Decision, served August 27, 1973, sheet 17.

In Tractors - T. L. & W. T. L. Territories, supra, proposed rates on tractors, supposedly justified by the need to meet private carrier competition, were disapproved on the basis that they would needlessly dissipate the rail proponents' net revenues. Division 2 found that the supposed justification of private carriage, in fact, involved negligible movements. (Ibid at 764) Division 2 also found that the respondents were already handling ". . . the great bulk of the shipper's traffic. . ." and concluded the rate proposal was unlawful because it would needlessly deplete the carrier's net revenue without the prospect of any increase in such revenues. (Ibid at 766) Similarly here, the Erie is already handling the traffic involved, and what it proposes to do is to enter into competition with itself over basically the same volume of traffic. Here respondents do not even purport to establish truck competition, private or for-hire, as justification for the protested rates. 18/

It is no answer to claim that the Erie is simply entitled to exercise its managerial judgment as to the profitability of the protested rates and the prospect of added traffic. In highly appropriate language, Administrative Law Judge Mittlebronn dismissed such a contention in I&S Docket No. 8777, Freight All Kinds, Between Illinois & New Jersey, supra. In dealing with a reduced rate proposal by eastern railroads, Judge Mittlebronn appropriately dismissed the carriers' argument that the rate adjustment was a matter solely for "managerial discretion". Judge Mittlebronn emphasized in language pertinent herein:

> "Such argument, without factual, probative, supporting evidence, must be rejected. For too long the Commission has relied on the managerial discretion of the eastern carriers in matters of this nature, and the result has been railroad financial deterioration to the point of discontinuing rail service to major segments of the nation in the eastern half of the country." (Ibid at Sheet 18)

It is no answer to assert that the prospect of new traffic for the Soo justifies an otherwise improvident

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18/ As we have previously emphasized, the protested rates were designed solely to meet existing water-rail or all-rail transportation options available to ConAgra, and were not designed or published to either meet or defeat itinerant truck competition from Buffalo to Martins Creek.

rate proposal for the Erie. The protested rates must meet the standards of lawfulness under the Interstate Commerce Act from the standpoint of both respondents. For the 12 month period ending September 30, 1973, the Erie reported a loss of $8.9 million of net railway operating income and no return on investment. By contrast, the Soo Line, for the same period, reported net railway operating income of $19.7 million and a rate of return of 7.37 percent. [19] It would be contrary to the intent of the Act, and clearly antipathetic to the provisions of Sections 1(5), 1(6), and 15a(2), as well as the National Transportation Policy, to allow the protested rates to become effective with the inevitable result of causing the bankrupt Erie to subsidize the prosperous Soo.

There is no question but that the Erie has embarked on an unwise venture in participating in the protested rates. This is particularly the case as it has available an effective five car from Buffalo to Martins Creek which has moved a considerable amount of traffic for ConAgra at a handsome profit for the Erie.

Further, the Erie has turned its back on its facilities at Buffalo. It has made no current effort whatever to improve whatever conditions may be adverse at its terminal in Buffalo. (R. 132-4) It has had no recent communications with its partner in that terminal, the Norfolk & Western Railway. (R.133) These additional circumstances further warrant disapproval of the instant rate proposal. In Competitive Produce Terminals Of Railroads At Denver, Colorado, 235 I.C.C. 699 (1940), the Commission was faced with an uneconomic railroad proposal for separate terminals for the handling of produce at Denver. The Commission observed:

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[19] Class I Line-Haul Railroads Selected Earnings Data, Sheets 3 and 8, Bureau of Accounts, Interstate Commerce Commission (released by I.C.C. Section of Administrative Services).

> "No railroad, if it is efficiently and economically managed, will deliberately choose a more expensive rather than a less expensive route for its operations between two points, and no railroad is performing its full duty to the public, especially in times of financial stress, unless and until it has availed itself of all of the means reasonably at its disposal, including whole-hearted cooperation with its competitors . . . , to function as economically and efficiently as it can." (Ibid at 713)

The Commission pointed out that at times when the railroads are having financial difficulties, their ". . . primary if not their whole concern should be to perform their transportation functions efficiently and economically. . ." (Id) Yet, in this case the Erie has demonstrated that it has not pursued any reasonable effort to maximize its revenues through using the existing five car rate available from Buffalo to Martins Creek. In effect, it has chosen ". . . a more expensive rather than a less expensive route for its operations . . ."

There is another aspect of the unlawfulness inherent under the protested unit train rates. This involves the likely disruption of the existing rail rate structure on flour in the Eastern Territory and serious competitive injury to other eastern railroads such as the Penn Central. Application of the protested rates would inevitably result in displacement of important flour revenue now accruing to the Penn Central, the Erie, and other eastern railroads. (Ex. 20, p. 7; Ex. 21, pp. 3-4) This is because ConAgra would be put at an unfair advantage, in terms of transportation costs, in marketing flour by private truck from Martins Creek which was milled from wheat brought into the Martins Creek facility under the protested rates. The result will be a loss of important and vital flour revenue to eastern railroads contrary to the clear intent of Section 15a(2) of the Act. The protested rates represent competition that is unduly destructive to a reasonable rate structure and competing carriers. See New Automobiles In Interstate Commerce, 259 I.C.C. 475, 534 (1945); All Freight From Eastern Ports To The South, 245 I.C.C. 207, 218-219 (1941).

Under the protested rates, the Erie will needlessly deplete and dissipate vital net revenues. There is no reasonable prospect for any significant gain of tonnage under the protested rates. The record is silent from ConAgra's standpoint on this issue. Contrary evidence establishes that the Erie's share of the traffic will not increase and it will be merely engaging in competition with itself if the protested rates become effective.

To allow the ratemaking here at issue would be directly contrary to the Congressional mandate that the Act be administered so as to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation. See 49 U.S.C. preceding §1 emphasis added. The protested rates must be condemned as violative of Section 1(5), 1(6), and 15a(2) of the Interstate Commerce Act and in contravention of the National Transportation Policy. The Commission is requested so to find.

THE FUNDAMENTAL UNLAWFULNESS OF THE PROTESTED RATES IS NOT CURED BY THE SOO LINE'S PARTICIPATION THEREIN.

The protested rates are seriously unlawful in their impact on the Erie. The protested rates cannot be approved whether or not they are desired by the Soo or to its advantage, which we do not concede. Proper and required disapproval of the unit train rates will protect the Erie from its own improvidence. Disapproval will protect shippers, including these milling company portestants, who must continue to look to the Erie for viable rail service. Disapproval will not impair the financial condition of the Soo. We have previously emphasized the Soo's strong, healthy financial condition compared to the critical status of the Erie. 20/ (See page 54, supra)

Beyond these considerations, however, a serious question remains whether the Soo would obtain any significant benefit under the protested rates. On prospective unit train movements from Duluth to Chicago under the protested rates, the Soo's variable costs were alleged to be approximately 20¢ per cwt. (Ex. 2, App. A) Such costs would produce a contribution of only 5¢ per cwt., based on the Soo's division of approximately 25¢ of the 72.25¢ rate. If its costs were accurate and reliable, which we do not concede,

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20/ The latest I.C.C. data available indicates the Soo had net railway income of nearly $20 million for the 12 month period through September, 1973. The Erie had a loss of nearly $9 million for the same period.

the Soo's ratio of division to variable cost would be only 127%. This low ratio is meager in comparison to the Erie's present 242% 21/ margin above variable cost on its existing five car rate. (See Table No. 2, *supra*, at page 30)

By its own cost analysis, the Soo has little to gain under the protested rates and hence little to lose if they are disapproved.

Also, the evidence of record casts strong doubt on the accuracy and thoroughness of Soo costs. There is reason to conclude those costs are understated. Illustrative deficiences in the Soo's cost analysis are briefly described below:

> 1. No expense was assigned for crew hold-overs or dead-heading on the second and succeeding trips ". . . on the segment between Superior and Stevens Point, Wisconsin in the case of trains originating or terminating at Duluth; and between Chippewa Falls, Wisconsin and Minneapolis for trains originating or terminating at Minneapolis." (Ex. 2, p. 2; R. 108) However, empty trains will arrive back with foreign crews at about 8:00 p.m., free time of 24 hours does not commence until the succeeding 7:00 a.m., and crews must be paid hold-over allowances if held 16 hours. 22/ Foreign crews could not perform local yard work

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21/ 242% on movements in Eire cars, based on 40¢ per cwt. existing rate for five car multiple shipments. (Ex. 31, p. 17, Table 2, Sheet 1)

22/ Trains arriving at Stinson yeard, Duluth, at 8:00 p.m. would not have to be loaded and ready until 24 hours after 7:00 a.m. of next morning. Allowances apply to crews after expiration of first 16 hours. (R. 461) because of union restrictions. (R. 466) Soo witness Gillette admitted hold-over expense was a possibility. (R. 459-462, 465-466) None was included in Soo costs. (R. 108)

2. Soo cost witness Crandall computed costs based on 6.4 origin switch minutes per car, Duluth, and 8.4 switch minutes per car, Minneapolis. (Ex. 2, p. 3) Witness Crandall testified such costs were derived entirely from operating data provided him by Soo operating witness Gillette. 23/ (R. 111) Origin switching operations, however, as described by witness Gillette, indicated 12 origin switch minutes per car, Duluth, and 7.2 origin switch minutes per car, Minneapolis. (R. 452, 464) These blatant discrepancies and inconsistencies with regard to origin switching time (and hence origin costs) were never resolved by the Soo.

3. Soo cost and operating witnesses sponsored different tare weight data in their direct evidence, making Soo's costs, per se, highly suspect (Ex. 2, p. 3; Ex. 15, pp. 2-3; R. 442-3, 480) A higher tare weight increase variable costs. (Ex. 32)

The Soo's participation in the protested rates would not basically, if at all, improve the Soo's net revenues. Its participation does not and cannot cure the serious unlawfulness resulting from the protested rates. The Commission is requested so to find.

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23/ "Mr. Gillette informed me as to the number of cwts., the number of moves-cars per cwt., and the relative time it would take . . ." (R. 111)

## THE SUSPENDED TARIFF PROVISIONS ARE ALSO SHOWN, IN THIS RECORD, TO BE UNJUST AND UNREASONABLE IN THE USE BY THE RESPONDENTS OF SERIOUSLY ERRONEOUS FACTORS AND ASSUMPTIONS UNDERLYING THE TARIFF PUBLICATION

It is elementary that this case ultimately is to be decided on the record made before Administrative Law Judge White. This is an elementary requirement of the Administrative Procedure Act. See 5 U.S.C. 706(2) (E). Universal Camera Corp. v. Labor Board, 340 U.S. 474, 488; I.C.C. v. Louisville & N. R. Co., 227 U.S. 88, 93. Again, we note the burden of proof imposed upon the respondents by Section 15(7) of the Interstate Commerce Act.

### On This Record Extension Of The Rate To Minneapolis-St. Paul (And Minnesota Transfer) Was Unwarranted, Unjust And Unreasonable.

The respondents assert that in publishing the suspended rates they were according to ConAgra a transportation cost essentially equivalent, according to the respondents, to those which would be incurred by ConAgra in transporting wheat from Duluth-Superior to Buffalo and thence from Buffalo to Martins Creek. (Ex. 1, pp. 12-13) This produced the lower of the two rates of 72.25¢ per cwt., now under suspension. (R. 26, 27, 34, 41, 48) ConAgra witness Stone confirmed that the 72.25¢ per cwt.

rate was published to meet lake-rail transportation of wheat from Duluth-Superior via Buffalo to Martins Creek. (Ex. 16, pp. 11-12)

As we will demonstrate hereinafter, even limiting the comparison of factors to Duluth-Superior as origin points the respondents have committed serious and harmful error. However, even before we reach that aspect of the matter, it is immediately apparent that the respondents have slipped far beyond their major premise, i.e. Duluth and Superior as origin points. This is because they have extended the 72.25¢ rate to the interior points of Minneapolis, St. Paul and Minnesota Transfer.* They have done this notwithstanding the fact that there is a rail distance of approximately 160 miles between the terminals at Minneapolis-St. Paul and the terminals at Duluth, Superior. (R. 14-15, 22, 504, 723, 976)

The practical and realistic fact was succinctly stated by witness Robert H. Smith, Deputy Executive Director of the Seaway Port Authority of Duluth as follows:

> "Actually an alternative cost from Minneapolis should include the amount of the proportional rate from Minneapolis to Duluth, inasmuch as that rate must be paid to put grain in store at Minneapolis in position to move by water-rail. . ." (Ex. 13, p. 9)

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* Inclusion of Minneapolis-St. Paul in the Buffalo unit train rate had been suggested by the Soo Line. (R. 587)

By no stretch of the imagination can the respondents successfully contend that the origins of Minneapolis, St. Paul and Minnesota Transfer are physically located at waterside at the head of the lakes. No matter how much the respondents seek to gloss over this reality, it remains starkly true. (R. 566, 567)

This glaring departure beyond the major premise of the 72.25¢ per cwt. rate cannot be rationalized by vague references to export rates, and rates in other adjustments. This case is to be decided by the record here made. This Commission has long recognized that export rates are sui generis and, as such - without more, are not a meaningful standard for domestic rates. (R. 52, 1240)

In Duluth Board of Trade v. Chicago & N.W. Ry. Co., 314 I.C.C. 695, the Commission pointedly observed at page 703:

> "It has long been settled that the circumstances and conditions which are controlling with respect to export traffic are substantially dissimilar from those which obtain with respect to domestic traffic. . ."

In the light of the record made in this case the according of the 72.25¢ per cwt. rate to Minneapolis, St. Paul and Minnesota Transfer has not been justified and is in fundamental violation of Section 1(5) of the Interstate

Commerce Act. The Commission is requested so to find and conclude.

### Respondents' Use Of Erroneous Factors And Omission Of Essential Factors In Establishing The 72.25¢ Per Cwt. Rate Further Demonstrate That It Is Unjust And Unreasonable In Violation Of Section 1(5) Of The Act.

The record in this case reveals both the elements which the respondents utilized and the elements which they disregarded in setting the level of the 72.25¢ per cwt. rate under suspension, applicable to Martins Creek, Pa.

Note has been taken of the fact that vessel transportation of wheat from Duluth-Superior to Buffalo on the Great Lakes is limited to the navigation season, from early April to the early part of December of each year. As indicated in Appendix 3 to Exhibit 1 of record the effective date of the suspended tariff was November 1, 1973. Item 140 indicates that the rate of 72.25¢ per cwt. would apply from April 1, 1974 through September 15, 1974. The rate of 88¢ per cwt. for application during the non-navigation season would apply from December 15, 1973 through March 31, 1974. It is immediately apparent from the aforesaid Item 140 that the 72.25¢ per cwt. rate, if not suspended, would have applied for the prospective navigation season of 1974 - which is now in the immediate offing. Both logic and practical business common sense would require that an intelligent and informed judgment should have been made by the respondents as to the level of the realistic vessel charge for the transportation of wheat during the 1974 navigation season. However, this was not only not done; suggestions that it be done were rejected by the respondents. (Ex. 18, pp. 6-7; Ex. 23, pp. 8-9; Ex. 26, p. 3; R. 567-568, 586, 600) These protestants submit that the respondents committed serious error in "looking backwards" instead of "looking forward" in setting the 72.25¢ per cwt. rate. This, in turn, necessarily resulted in an understatement of the suspended rate for application during the navigation season. (R. 26, 47, 496, 497)

The attached Exhibit 5 to ConAgra witness Stone's Exhibit 16 treats of "Lake Freight Rates on Wheat to Lake Erie Ports". It shows a generally upward trend from 11¢ per bushel in early 1966 to 17¢ per bushel in late 1971, with a steady upward trend throughout. As witness Scoggin pointed out he regarded the 45% increase over six years as substantial - and realistically so. (Ex. 18, p. 7) In addition to relying on the probative evidence in this record, the Commission in issuing its Report herein is entitled to take official notice of the continuing inflationary trends in the economy, which have been so severe as to warrant enactment by the Congress of the Economic Stabilization Act of 1970 (as amended), Public Law 91-379, 84 Stat. 799, as amended. (R. 25, 48, 512, 573, 590, 963-964, 1035).

At pages 8-9 of his Exhibit 23 witness Hackbart presents an extremely conservative analysis wherein he reflects for the 1974 navigation season the prospective results which would occur if the trends reflected by ConAgra witness Stone in attached Exhibit 5 to his Exhibit 16 continued to apply. Utilizing that admittedly conservative analytic tool witness Hackbart concluded as follows:

> ". . . I agree with Mr. Scoggin that there is a very high degree of probability that the vessel charges for the next season of navigation commencing in April, 1974 will increase. I base this on the general inflationary trends in the economy, including increased labor costs and increased fuel costs, etc. as well as the historic increases as cited in witness Stone's Exhibit 5. Witness Scoggin page 7 shows an increase of 45% over 6 years, or an average of 7-1/2% per year. The lake carrier wheat rates, according to witness Stone averaged 25.83¢ per cwt. in 1973 (25.00 + 26.67 ÷ 2). In my opinion such vessel rates can reasonably be expected to average at least 27.77¢ per cwt. in the 1974 vessel season, employing the 7-1/2% annual increment (25.83 + 1.937). This example indicates that the 1974 Duluth to Martins Creek rate during the navigation season has been understated by a minimum of 1.94¢ per cwt. or approximately 2¢ per cwt." (Ex. 23, p. 9)

Soo Line witness Smith conceded that the respondents had used a vessel charge for the transporting of wheat from Duluth-Superior to Buffalo of 16¢ per bushel or 26.67¢ per cwt. (Ex. 1, p. 12) ConAgra witness Stone used an even lower basis in his comparisons, i.e. 25.00¢ to 26.67¢ per cwt. for the vessel charge to move wheat via laker to Buffalo. (Ex. 16, pp. 12-13) That these calculations were unrealistically low was conclusively demonstrated in the record by witness George D. Goble, testifying out of 34 years of experience in the grain business, including extensive experience in arranging for the transportation and delivery of wheat from the head of the lakes to Buffalo. Mr. Goble's experience includes chartering the vessels when the grain moves via lake. (Ex. 26, pp. 1-2; R. 830) Calling upon that broad and deep experience, witness Goble testified as follows:

> "Witness Stone at page 11 of his Statement refers to lake freight charges from Duluth to Buffalo up to 16¢ per bushel or 26.67¢ per cwt. for the 1973 navigation season. If permitted, the suspended railroad rate of 72.25¢ per cwt. on wheat to Martins Creek would apply during the 1974 lake navigation season. In my considered opinion the lake vessel charges as such on wheat for the 1974 navigation season will increase to at least 17.5¢ to 18.0¢ per bushel or to 29¢ to 30¢ per cwt. It would not be surprising if these vessel charges rose even higher in the 1974 navigation season." (Ex. 26, p. 3)*

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* At the end of the 1973 lake vessel season one wheat shipper paid a vessel charge of 33 1/3¢ per cwt. (R. 586)

It is clear that with respect to the vessel charge factor alone utilized by the respondents, they have understated, by their own methodology the factor of vessel charge by at least 6¢ per cwt. (33.33¢ - 26.67¢)

This error is to be evaluated in the light of the admission on cross-examination by ConAgra witness Stone, testifying as to selection of routes and rates. Mr. Stone testified as follows:

> "Q. And is as much as a cent a hundredweight important or do you have to get up to very large numbers?
>
> "A. A cent a hundredweight is important.
>
> "Q. Two cents is even more important?
>
> "A. Absolutely. . . ." (R. 1122)
> (See also R. 661)

The record is clear that the respondents seriously erred in combining the elements to make up the level of the 72.25¢ per cwt. rate during the navigation season due to your understatement of the cross-lake vessel charges on wheat from Duluth-Superior to Buffalo by at least 6¢ per cwt. The Commission is requested so to find and conclude.

### Respondents' attempt to rationalize the foregoing error as to vessel charges was both extraneous and invalid.

Probably sensing the grave omission and error committed with respect to their factor for the vessel transportation charge the respondents somewhat tortuously sought to take refuge in reference to a transit rate. This was clearly an after-thought. It was mentioned by neither Soo Line witness Smith nor ConAgra witness Stone (or any other respondent witness) in their opening evidence purporting to justify the suspended rates. (Ex. 1, pp. 12-13; Ex. 16, pp. 12-14) It is also elementary that the balance of a transit rate is only available provided the shipper meets the often numerous and complex requirements of a transit tariff. (R. 563, 689, 848, 857, 1233, 1241, 1242, 1245) Otherwise, the shipper faces the spectre of the Elkins Act, 49 U.S.C. §41(1), et seq. See Transit on Cottonseed at Quanah, Tex., 232 I.C.C. 183 at 189. (R. 859, 1239)

### Existence of the Buffalo unit train rate does not remotely justify or legalize the suspended unit train rate to Martins Creek.

In reading the offerings of the respondents, one perceives an effort on their part to suggest that the existence of the Buffalo unit train rate justifies the 72.25¢ per cwt. unit train rate to Martins Creek. This is simply not the case. The record reveals that the basic purpose of the Buffalo unit train rate had nothing to do with the transportation factors applicable during the navigation season on the Great Lakes from early April to early December of each year. Witness Scoggin stated the matter succinctly as follows:

> ". . . The Buffalo unit train rate was not designed to compete with vessel transportation across the lakes during the navigation season which usually extends from April to mid December. Rather, it was designed to provide an alternative to the practice of storing the grain in vessels in the wintertime. Winter storage involves various cost elements in addition to cross lake navigation costs and the cost of using the vessel for storage after the cross lake journey has been completed. It also includes factors such as interest, insurance, and fluctuations in wheat prices following the close of the season of navigation. All these elements were taken into consideration in constructing the level of the Buffalo unit train rate." (Ex. 18, pp. 3-4) (See also R. 558-559, 567, 568, 585, 617)

The Buffalo unit train rate has been subject to review and evolutionary change. For example, originally the Buffalo unit train rate permitted the use of either hopper or boxcars. However, effective December 27, 1971, the Soo Line published a new rate restricted to large covered hopper cars. There have also been changes in the demurrage charges and rules; there was a change in the minimum weight from 4,950 tons to 5,000 tons. At the same time the Soo Line and participating carriers allowed the old basis of rates to remain in effect. The new and changed rate is at the level of 43¢ per cwt. The other and higher rate, which became effective January 1, 1978, is at the level of 48¢ per cwt. (Ex. 18, pp. 4-5 and App. C; R. 555, 556, 571, 580, 647, 938)

None of the flour millers at Buffalo presently have a unit train rate which is competitive with the vessel movement of wheat to Buffalo during the navigation season. However, ConAgra, while purporting to obtain only what the Buffalo millers have, is actually here seeking to obtain something very different, i.e. a reduced rate purporting to compete with the vessel movement of grain across the Great Lakes during the open navigation season. (Ex. 18, pp. 8-9)

Comment is in order with respect to the contention of ConAgra witness Stone at page 16 of his Exhibit 16. There he refers to the September 15th expiration date applicable to the Buffalo unit train rate and which would apply to the suspended tariff provisions. Therein witness Stone had indicated that the Buffalo unit train rate " . . . is also based on precisely the same 'water factor' as is the proposed (suspended) rate." This is not realistic. With respect to the Buffalo unit train rate the new rate published on September 15 or shortly thereafter governs only charges by rail to be compared with winter storage in lake vessels for the coming season of closed navigation. By way of contrast, as we have noted above as of September 15 the suspended rate of 72.25¢ per cwt. is prospective as to alternative rail movements to take place in the next season when navigation opens. (Ex. 18, pp. 6-7) As was pointed out by witness Scoggin, the appropriate time for setting any prospective open navigation season unit train rate would be the end of February just prior to the prospective new navigation season, and not the previous September 15th. (Ex. 18, p. 7; R. 590) In consequence, the September 15th expiration date in the suspended tariff is in fundamental violation of Section 1(6) of the Interstate Commerce Act as an unjust and unreasonable regulation and practice affecting the 72.25¢ per cwt. rate published for application during the Great Lakes navigation season. The Commission is requested so to find and conclude.

### BEARING IN MIND THE DEMONSTRATED UNLAWFUL DISSIPATION OF ERIE LACKAWANNA REVENUES INHERENT IN THE SUSPENDED TARIFF PROVISIONS, THE RECORD FURTHER DEMONSTRATES THAT, IN DISREGARDING TRUCK DELIVERY EXPENSES OF FLOUR IN THE EASTERN MARKET, THE SUSPENDED TARIFF PROVISIONS WOULD UNLAWFULLY CONFER AN UNWARRANTED COMPETITIVE BENEFIT UPON CONAGRA AT MARTINS CREEK, PA.

This Commission rightly takes pride in the fact that it endeavors, in its deliberations and in its decisional process, to be governed by the substance rather than the form. One of the dominant realities contained in the record in this case is the fact that an ever growing number of bakeries in the Eastern market either insist upon or prefer receiving their bakery flour by truck. This is necessarily true with respect to the large and increasing number of bakeries which are not on rail sidings. This is also true of a number of bakeries which are on rail sidings, but prefer the flexibility of truck delivery. (Ex. 25, pp. 5-6 and App. B; Ex. 18, pp. 10-11; Ex. 19, pp. 5-7; Ex. 20, pp. 5-6; Ex. 21, pp. 7-11; R. 922-923, 925, 934, 937; R. 507, 509, 512, 542, 626, 627, 628, 629, 631, 640, 641, 643, 644, 662, 663, 664, 665, 669, 685, 686, 709, 730-731, 733, 734, 743-744, 945, 946, 948, 950, 958, 1125, 1126)

This brings us to a grossly erroneous purported comparison contained in attached Exhibit 4 to Statement Exhibit 16 of ConAgra witness Stone. This purports to show a competitive relationship with respect to wheat flour delivered to four key destinations in the Eastern market: Philadelphia, Pa.; Brooklyn, N.Y.; Hackensack, N.J. and Jamaica, N.Y. The comparison purports to be with respect to wheat flour shipped to these destinations (a) via private truck when from Martins Creek, Pa. and (b) via single car rail rates when from Buffalo, N.Y. An analysis of attached Exhibit 4 to Stone Exhibit 16 indicates that not a single penny has been included to reflect the cost of trucking flour from rail-head to bakery, where truck delivery is either required or preferred by the baker! Such an omission is so egregious as to verge on the preposterous. The result is, for that one reason alone, a serious understatement of the cost involved in moving the wheat flour from Buffalo to such destinations where final delivery is by Buffalo would range from 100 to 200 miles. (R. 595, 623-627, 920, 921, 922, 923)

Witness Deatrick is Vice President - Marketing - Industrial Foods Division of International Multifoods Corporation. Since 1946 he has spent his entire business career in the field of flour sales. Since February of 1970 he has had responsibility for supervision over I.M.F. sales of flour throughout the United States, with the exception of family flour. (The latter represents flour sold in small packages, e.g. 5 lbs. or 10 lbs.) He actively supervises the bakery flour marketing efforts of I.M.F.'s Buffalo mill, including sales to the important Eastern market here involved. (Ex. 25, pp. 1-3) In Appendix B to his Exhibit 25 witness Deatrick has set forth representative bakery locations in the Eastern market, naming companies, whether they take bulk or sacked flour, and whether the plants are on-track or off-track.* The examples are set forth in three and one half pages of Appendix B. (R. 933-935, 937, 948, 958) Speaking of the latter witness Deatrick testified as follows:

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* ConAgra witness Stone has no comparable study available. (R. 509)

> " . . . Attention is called to the number of these bakeries which are off track and must receive their flour whether sacked or bulk by truck. In this category of customers, a company such as Multifoods has the problem of moving the flour from the rail head to the customer by truck. That is obviously an additional expense which is significant. In addition, there are some bakeries who have rail sidings who prefer truck delivery of flour. Truck delivery of bulk flour is a much simpler operation than rail delivery of bulk flour, resulting in economies of time and labor to the usual bakery receiver of flour." (Ex. 25, p. 5)

Witness Kucharo, General Traffic Manager (now Vice President - Transportation) of Ross Industries, Inc. testified that the states of Pennsylvania, New York and New Jersey traditionally account for substantial portions of the distribution of his company's bakery flour. (Ex. 21, pp. 1-2) Ross relies on long-haul rail service from its midwestern mills in serving eastern accounts. (Ex. 21, p. 2) To service eastern accounts it is necessary in many instances for Ross to provide bulk truck delivery from a local rail siding. Confirming the above quoted testimony of witness Deatrick, witness Kucharo testified unequivocal terms as follows:

> " . . . Our experience has been and continues to be that eastern bakeries prefer if not require the flexibility of truck delivery. Many bakeries, whether or not located on rail sidings, tend to seek to avoid extensive inventories of bulk flour, and look wherever possible for inbound truck delivery of bulk flour.

> "This strong tendency to rely on truck delivery enhances the competitive advantage of mills such as ConAgra's Martins Creek facility which serves the east through its private truck operations. In many cases, we must compete by use of local commercial trucking companies to provide deliveries from local rail sidings where our bulk rail shipments terminate." (Ex. 21, p. 3)

The same economic fact of life was confirmed by the testimony of witness E. E. Kohlwes, Vice President, Standard Milling Company, by witness J. R. Scoggin, Vice President-Traffic of Peavey Company, and by Mr. J. Robert Woolery, Assistant Vice President, ADM Milling Company. (Ex. 19, pp. 5-7; Ex. 20, pp. 5, 7) (See also R. 596, 599, 649, 669, 677, 741, 743, 744, 916, 925)

Notwithstanding these facts, the Soo Line admitted on the record it did not even concern itself with the ultimate competitive impact of the suspended rates in terms of the delivery of flour in the Eastern market. (Ex. 1, pp. 12-13, R. 35, 40)

The contrast is remarkable between the detailed attention given by ConAgra to its own private trucking costs from Martins Creek to Eastern bakery points and the total absence of even a reference to the trucking costs from rail-head to bakery points which must be borne by the protestant flour milling companies. As noted, such omission is glaringly apparent (by its absence) in attached Exhibit 4 to ConAgra witness Stone's Exhibit 16. This is a serious and fundamental error. (R. 596)

Bearing in mind the importance attached by ConAgra witness Stone to a difference of as much as 1¢ per cwt. or 2¢ per cwt., quoted earlier in this Brief, the record reveals the experience of the protesting flour milling companies in incurring expense to effect truck delivery of flour from rail-head to customers in the Eastern market. It is to be borne in mind that all of these milling companies (including ConAgra) are engaged in intensive competition each with all the others. Thus, it is quite expectable that the experience of each of these companies with respect to the incurrence of truck delivery costs on flour to Eastern bakeries would reflect particular ranges and variations. The record reveals both that such is the case and that the truck delivery expense incurred by the protestant flour millers is a substantial item which simply cannot be ignored - as was attempted by witness Stone in attached Exhibit 4 to his Exhibit 16.

Even without the suspended rates, the Buffalo millers have lost accounts to ConAgra in this eastern market. (R. 509, 511, 847, 850, 851, 852, 853, 854, 924, 946, 947, 951, 952, 956, 958)

Table No. 7 below reflects the variations in experience of the protesting flour milling companies.

## Table No. 7

Cost Factor Of Truck Delivery Of Bakery Flour From Rail-Head To Bakeries In Eastern Market Here Involved. (Figures Expressed in Cents per cwt.)

| Company | Record Source | Truck Delivery Cost Factor (Per cwt.) |
|---|---|---|
| Peavey Company | Ex. 18, App. D | 12¢ to 26.5¢ |
| Standard Milling Company | Ex. 19, p. 6, R. 644-645 | 12¢ to 50¢ |
| ADM Milling Company | Ex. 20, p. 4; R. 687 | 25¢ |
| Ross Industries, Inc. | Ex. 21, p. 3; R. 700, 730, 731, 732 | 25¢ to 30¢ |
| International Multi-foods Corporation | Ex. 25, p. 6; R. 926, 943, 958 | 10¢ to 38.5¢ |
| Range Indicated | Nos. 1-5, above | 10¢ to 50¢ |
| Median or Mid-Point Cost Factor | Nos. 1-6, above | 30¢ |

In the light of the evidence previously cited and the cost of truck delivery of bakery flour in the eastern market, moved from rail-head, the disregard of this element in the attached Exhibit 4 to Stone is an omission of monumental proportions. Again, we note the concession by witness Stone, quoted earlier herein that one or two cents per cwt. is of tremendous importance in determining via which route a movement will be made. (R. 644, 1122)

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Witness James R. Scoggin is Vice President-Traffic of Peavey Company. He has been actively engaged in the field of traffic and transportation for 25 years. (Ex. 18, pp. 1-2) In his evidence in this record Mr. Scoggin has, among other things, directed his attention to the aforesaid Exhibit 4 attached to Stone Exhibit 16. Witness Scoggin has zeroed in on the omissions of witness Stone both with respect to the cost elements involved with respect to the movement of wheat from Duluth-Superior to Buffalo and with respect to effecting the final delivery of bakery flour from Buffalo, from rail-head to bakery plant via truck delivery. (Ex. 18, pp. 10-12 and App. D) In Appendix D witness Scoggin has presented the essential elements to the four destinations selected by witness Stone - Philadelphia, Pa., Brooklyn and Jamaica, N.Y. and Hackensack, N.J. Because of the importance of the evidence, Appendix D to Exhibit 18, as introduced in the record, is included in this Brief as Attachment No. 1. The latter, of course, is a presentation with respect to Peavey Company. However, it is clearly probative in demonstrating the serious fallacies embodied in attached Exhibit 4 to Stone Exhibit 16. (R. 592, 600)

It is worth reiterating here the understatement by the respondents and ConAgra with respect to vessel charges for the movement of wheat cross-lake from Duluth-Superior to Buffalo. We noted that Soo Line witness Smith had utilized

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a figure of 26.67¢ per cwt.; ConAgra witness Stone had utilized a figure of 25.00¢ to 26.67¢ per cwt. (Ex. 1, p. 12; Ex. 16, pp. 12-13) In the course of cross-examination at transcript page 585 witness Scoggin had indicated that at the end of the 1973 vessel season Peavey had incurred a vessel transportation charge of 20¢ a bushel or 33-1/3¢ per cwt. (R. 585-586)

When one compares the figures presented by witness Stone in the final column of his Exhibit 4 attached to Exhibit 16 with the figures presented by witness Scoggin in his Appendix D [Attachment 1 hereto] the understatements by witness Stone are as follows:

| Destination | Understatement By Witness Stone (Cents per Cwt.) |
|---|---|
| Philadelphia, Pa. | 40.59¢ per cwt. |
| Brooklyn, N.Y. | 22.09¢ per cwt. |
| Hackensack, N.J. | 28.09¢ per cwt. |
| Jamaica, N.Y. | 22.09¢ per cwt. |

We would emphasize that this is conservative in reflecting 1973 costs. Earlier, in this Brief, we noted that the disparity and disadvantage to the protestant flour milling companies would be even greater because of the inevitable, higher cross-lake vessel transportation charges applicable to the prospective 1974 vessel season.

We have seen the unlawful and unjustified dissipation of revenues with respect to the Erie arising out of the suspended tariff provisions. This unlawfulness is compounded when due note is taken of the substantial competitive handicap which would be imposed upon the protesting flour millers, should the tariff provisions be permitted, in terms of the necessity of truck delivery from rail-head to bakery plants in the many instances where the bakeries are not on rail siding and in the important number of instances where the baker prefers or requires truck delivery, even when located on rail siding. (Ex. 25, pp. 5-6 and App. B; Ex. 18, pp. 10-11; Ex. 19, pp. 5-7; Ex. 20, pp. 5-6; Ex. 21, pp. 7-11; R. 922-923; 925, 934, 937; R. 662, 663, 664, 665, 669, 685, 686, 709, 730-731, 733, 743-744). This is but a further demonstration that the suspended tariff provisions violate Section 1(5) of the Interstate Commerce Commission and the proscription in the National Transportation Policy with respect to the establishment and maintenance of reasonable charges for transportation services. The Commission is requested so to find and conclude.

## Seriously Adverse And Unlawful Impact Of The Suspended Tariff Provisions Upon The Western Flour Miller Protestants

We have adverted to the failure of the respondents and their supporting intervenor, ConAgra, to take into account, inter alia, the very substantial impact of the suspended tariff provisions in terms of the competitive reality of truck delivery of flour in the eastern market, both to bakeries which are not on railroad siding and on bakeries which require or prefer truck delivery of flour, notwithstanding the fact that they are on rail siding. The discredited Exhibit 4 attached to Stone Exhibit 16 also committed another grave error of omission. Witness Stone did not see fit to mention the magnitude of the impact of the suspended rates on shippers such as ADM Milling Co. and Ross Industries, Inc., in the efforts of the latter to distribute their bakery flour to the important eastern market here involved. (R. 624, 659, 660, 702)

At pages 2 to 5 of his Exhibit 20, witness Woolery has demonstrated the cost advantage of 24¢ per cwt. already enjoyed by ConAgra vis-a-vis ADM - in reaching bakery accounts in the east which require or prefer truck delivery. Mr. Woolery then compared the effect of the application of the suspended 72.25¢ per cwt. rate in terms of ADM seeking to market flour in the east at the important destination of Philadelphia, Pa. from ADM's Minneapolis, Minn. mill. The results are set forth in Table No. 8 below.

TABLE NO. 8

Comparison Of Transportation Costs On Bulk Flour Delivered Under Protested 72.25¢ Rate To Philadelphia, Pennsylvania, From Martins Creek Versus Minneapolis, Minnesota Mill.

| Martins Creek | Minneapolis/St. Paul |
|---|---|
| 72.25¢ per cwt. (1) | 118¢ per cwt. (4) |
| 2.00¢ per cwt. (2) | 25¢ per cwt. (5) |
| 29.00¢ per cwt. (3) | 143¢ per cwt. |
| 103.25¢ per cwt. | |

---

(1) Protested rate on wheat from Minneapolis/St. Paul to Martins Creek "B" plant.
(2) ConAgra private truck cost on wheat from Martins Creek "B" plant to Martins Creek "A" plant.
(3) ConAgra stated private truck cost from Martins Creek to Philadelphia (Stone Statement, Dx. 3A).
(4) Rail rate on flour from ADM's Minneapolis mill to Philadelphia. (WTL 332-H, ICC A-4864, C/TN 245 I, ICC C 375)
(5) Bulk truck transfer and delivery cost for local flour delivery within Philadelphia.

Source: Ex. 20, p. 6.

Thus, if the suspended 72.25¢ rate were permitted to become effective ADM would be faced with a competitive disadvantage, as indicated in Table No. 8 , of 39.75¢ per cwt. at Philadelphia.

As did witness Woolery, witness Kucharo earnestly objected to the unwarranted granting of the 72.25¢ rate, purportedly to meet lake-rail competition, to Minneapolis-St. Paul, located approximately 160 miles away from Duluth-Superior. (Ex. 20, p. 6; Ex. 21, pp. 4-6; R. 14-15) Witness Kucharo further pointed out that the suspended 72.25¢ per cwt. rate applicable from Minneapolis/St. Paul would give ConAgra an unwarranted advantage in their procurement of hard winter wheat, for standard bakery blends. He pointed out that hard winter wheat traditionally is blended with spring wheat in the milling process. Application of the 72.25¢ rate from Minneapolis/St. Paul would permit ConAgra to obtain Omaha hard winter wheat at a lower transportation cost than it must pay today over Omaha. Pertinent figures are set forth in Table No. 9 below.

## TABLE NO. 9

### Comparison Of Present All Rail Rate From Omaha To Martins Creek Versus Combination Available Using Protested 72.25¢ Rate.

| Present | | Combn./Protested | |
|---|---|---|---|
| 44¢ | (1) | 36¢ | (3) |
| 81¢ | (2) | 72.25¢ | (4) |
| 125¢ | | 108.25¢ | |

---

(1) Present proportional rate Omaha to Chicago (WTL 332-H, ICC A 4864).

(2) Present proportional rate Chicago to Martins Creek. (TL-CTR C/TN 245-I ICC C 375)

(3) Present proportional rate Omaha to Minneapolis. (WTL 332-H, ICC A 4864)

(4) Protested rate Minneapolis to Martins Creek.

Source: Ex. 21, p. 6

Table No. 9 indicates that if the suspended rate of 72.25¢ per cwt. were permitted to become effective this would permit ConAgra to obtain hard winter wheat from Omaha at a reduction in transportation costs of approximately 17¢ per cwt., thereby further increasing ConAgra's advantage in serving eastern accounts with bakery flour. (Ex. 21, p. 7) This important option which would be available to ConAgra cannot be disregarded. Whether or not for the moment ConAgra utilizes Omaha in the manner contemplated in Table No. 9 above, that important option would continue to be available to ConAgra to the disadvantage of Ross and other western flour millers seeking to market bakery flour in the eastern market here involved. (R. 1103, 1104, 1105)

A basic aspect of the views of the protesting western millers was well stated by ADM witness Woolery as follows:

> ". . . There is no justification, in my opinion, for bestowing such a transportation cost advantage on ConAgra from Minneapolis/St. Paul, particularly where there is the absence of any water competition in the movement of wheat from Minneapolis/St. Paul to Martins Creek." [Ex. 20, p. 7]

Further adverting to Table No. 8 above witness Woolery further stated:

> "Our mills located at Red Wing, Minnesota and Des Moines, Iowa will suffer a similar, substantial disadvantage in seeking to compete with ConAgra at Martins Creek. These mills purchase wheat on the Minneapolis market. These mills ship wheat flour to bakery accounts in the east under the same rate structure as our Minneapolis mill. The competitive handicaps to which we will be placed under the protested rates were illustrated above by reference to Philadelphia. Essentially the same situation would prevail at other destinations in the east." (Ex. 20, p. 7)

The evidence with respect to the serious competitive disadvantage* to the western flour mills further demonstrates that the suspended tariff provisions violate Section 1(5) of the Act and are in conflict with the National Transportation Policy. The Commission is requested so to find and conclude.

## THE SUSPENDED TARIFF PROVISIONS, AND THEIR PROPOSED APPLICATION, WOULD BE SERIOUSLY VIOLATIVE OF SECTION 3(1) OF THE INTERSTATE COMMERCE ACT PROHIBITING UNDUE OR UNREASONABLE PREFERENCE OR PREJUDICE.

We have earlier noted the very proper concern of this Commission, in administering the Interstate Commerce Act, that the agency exercise its regulatory powers to treat with the substance rather than the form of matters before it. Applying that standard, the record made before Administrative Law Judge White reveals unlawful favoritism on the part of the respondents to the advantage of ConAgra at Martins Creek and to the disadvantage of the protesting flour millers.

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*The record reveals that, even without the instant suspended rates, ConAgra has been taking bakery accounts away from protestants. (R. 662, 663, 664, 666, 707, 708, 709, 710, 728, 729, 735, 743, 744)

One of the paramount facts confronting both the railroads and the shipping public, as well as the Commission, is the acute shortage of hopper cars (and other equipment) throughout the nation.* See Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices, 335 I.C.C. 264; 335 I.C.C. 874; 343 I.C.C. 360; 341 I.C.C. 64. With notable frequency this Commission, pursuant to its powers under Section 1(15) of the Interstate Commerce Act, is issuing Car Service Orders, the objective of which is to promote the fair, equitable and efficient distribution of hopper cars, boxcars, and other types of railroad equipment. (R. 59, 528, 1029, 1131, 1215, 1216)

This brings us to one of the astonishing facts brought to light in this record. In conjunction with the suspended tariff provisions publishing the unit train rate to Martins Creek, Pa., the Soo Line has admitted it has made a commitment to ConAgra that the necessary hopper cars will be made available to ConAgra. On cross examination Soo Line witness Smith testified as follows:

> "Q Now, the Soo Line has committed itself, as I understand it, to provide the equipment for this movement to Martins Creek; is that correct?
>
> A That is correct.
>
> Q That is not provided in the tariff, is it?

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* This has been exacerbated by the "Russian wheat deal", which "caught everybody by surprise." (R. 1245)

> A No, sir.
>
> Q Have you made that commitment in writing to ConAgra?
>
> A Not to my knowledge, there's been no commitment in writing. There has been an oral understanding as between the Erie, ConAgra, and Soo." (R. 56-57)

No such "commitment" is available to the shippers inclined to use the Soo Line in the Buffalo unit train rate. Indeed, such shippers must persuade other railroads, in large measure, to provide the necessary cars for movement under the Buffalo unit train rate. (R. 58, 638, 648, 652, 833, 834, 858, 859, 1042, 1229) In the past the Soo has been either unable or unwilling to provide cars needed in connection with the uni train movement to Buffalo. (R. 57, 60, 556, 557, 828, 829, 831, 845, 853) It is to be remembered that 50 cars, in three consecutive movements, will be necessary in the unit train under the suspended tariff. (Ex. 15, p. 3; R. 59, 61, 69, 70, 100, 1016, 1218, 1229)

The magnitude of the Soo Line commitment to ConAgra is indicated when it is recognized that under I.C.C. Car Service Order 1120 the Soo Line can only use 277 jumbo hoppers in unit train service. (Ex. 15, p. 2; R 469, 1044) The grim fact is that shippers seeking to utilize the Buffalo unit train rate during the non-navigation season are experiencing difficulties in obtaining the necessary cars - including difficulties with the Soo Line. (Ex. 18, p. 12; R. 550, 556-557, 568, 569, 605, 606) Indeed, in explaining the failure to provide cars to one

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*Due to lack of cars for movement under the Buffalo unit train rate of 43¢ per cwt., shippers have been forced to ship wheat to Buffalo at the single car rate at a much higher basis. (R. 560, 570, 571, 618, 637-638, 651, 652) shipper who sought to use the Buffalo unit train rate, the Soo Line explained that the carrier had a prior commitment to ConAgra. (R. 606) We would emphasize that this problem is not limited to a particular shipper. (R. 73, 606, 637, 638, 828-829, 831, 833, 834, 844, 853, 858-859)

The foregoing situation is a classic example of a violation of Section 3(1) by virtue of undue and unreasonable preference of ConAgra and undue and unreasonable prejudice against the protesting shippers seeking to move wheat to Buffalo under the Buffalo unit train rate.

We hasten to point out that this is not the full extent of the undue and unreasonable preference and prejudice, violative of Section 3(1) embodied in the suspended tariff provision. Apparently to ensure total satisfaction to ConAgra, the respondents have included in the tariff provisions the right on the part of ConAgra to receive payment by way of mileage allowances in the event that ConAgra provides any of the cars utilized in the unit train movement to Martins Creek under the suspended tariff. This is by virtue of Item 110 which makes the tariff subject to Agent B. B. Maurer's mileage tariff 7-C, I.C.C. H-54. No such privilege is extended by the Soo Line to shippers under the Buffalo unit train rate. (R. 56, 575, 576, 598) The record reveals that ConAgra has 150 private cars, which would be eligible for receipt of mileage allowances. (R. 56, 515, 598, 1129, 1130)* Thus, the respondents have placed

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* The current mileage allowance on covered hopper cars is 15¢ per loaded miles. (R. 56)

ConAgra in a doubly happy position: The Soo has made a commitment that all the cars necessary for ConAgra will be made available. Should any circumstances to the contrary develop, by Car Service Order or otherwise, the Soo has included provision for payment of mileage allowance for the use of private cars furnished by ConAgra. Neither such benefit is provided by the Soo to the flour millers shipping wheat under the unit train rate to Buffalo. In addition, a more liberal free time privilege is accorded at Martins Creek than at Buffalo. (R. 65)

In consequence, we have here a blatant violation of Section 3(1) of the Interstate Commerce Act another substantial and compelling reason why the suspended tariff provisions should be ordered cancelled.

In Interstate Cotton Oil Refg. Co. v. A., T. & S. F. Ry. Co., 95 I.C.C. 171 the Commission at page 176 pointedly observed:

> " . . . It need hardly be said, however, that unlawful preference and prejudice may arise from difference in service as well as from difference in measure of rates . . ."

The instant tariff provisions are seriously violative of Section 3(1) of the Act. The Commission is requested so to find and conclude.

### IN ADDITION TO THE OTHER ELEMENTS OF UNLAWFULNESS IN THE SUSPENDED TARIFF PROVISIONS, THEY ARE ALSO UNLAWFUL IN VIOLATION OF THE NATIONAL TRANSPORTATION POLICY AND SECTION 1(5) BECAUSE OF THEIR SERIOUSLY ADVERSE IMPACT UPON THE PENN CENTRAL TRANSPORTATION SYSTEM.

The Penn Central is a protestant against the suspended tariff provisions. Undoubtedly the Penn Central will exercise its right to submit a Brief to the Commission. Accordingly, these protesting flour millers will not protract their Brief by detailed discussion of the impact, demonstrated in the record, of the suspended tariff provisions to the serious detriment of the Penn Central (and indeed of other Eastern lines). [See testimony of witness Olson - Verified Statement Ex. 27, Oral Testimony R. 977, et seq.] While ConAgra witness Stone discussed the possibility of moving wheat via Penn Central from Buffalo to Martins Creek with Penn Central executives Wallace and Olson, Mr. Stone admitted he never discussed anything about car supply with these gentlemen. (R. 540, 991, 992, 993, 994)

The record is clear beyond question that the flour millers at Buffalo depend upon the Penn Central, in substantial measure, for the movement of their flour from Buffalo to the Eastern market. The record also reveals that the western flour mill protestants likewise depend to a substantial degree upon the Penn Central in distributing their flour in the east. We are, of course, here referring to bakery flour - the kind which ConAgra is milling at Martins Creek and distributing in the Eastern market. (Ex. 18, p. 2; Ex. 19, p. 5; Ex. 20, p. 8; Ex. 21, p. 4; R. 704-706, 722, 727-728, 739, 740, 745, 746)

Witness E. E. Kohlwes, Vice President of Standard Milling Company, took particular note of the importance of the Penn Central as well as the Erie Lackawanna in serving his company at Buffalo. He testified as follows:

> " . . . As to rail service from Buffalo, as I have noted the Erie Lackawanna serves our Buffalo elevator and the Penn Central serves our Buffalo mill. While the Buffalo Terminal District is presumably like other large terminal districts, such as Duluth-Superior, Chicago, Minneapolis-St. Paul, and Kansas City, in my opinion these two railroads are providing reasonable and adequate rail service at Buffalo. *Standard is, of course, dependent upon the Penn Central in Standard's efforts to market flour from its Buffalo mill*."
> (Ex. 19, p. 5) (Emphasis added)

The amount of bakery flour which will move by rail from ConAgra's Martins Creek mill will be negligible. It will move by private truck. (R. 486, 492, 529, 738, 1022; Ex. 16 - attached exhibits 3-A, et seq.)

The instant proposal is directly harmful to the Penn Central. As a practical matter, it is also directly harmful, in consequence, to these protesting flour millers utilizing the Penn Central in reaching the Eastern market here involved. (R. 718, 996, 1017, 1019, 1020)

So critical is the plight of the Penn Central (and other official territory carriers) that the Congress has enacted the "Regional Rail Reorganization Act of 1973, Public Law 93-236, 87 Stat. 985 (January 2, 1974). The Commission has also been concerned as indicated by institution of Ex Parte No. 293, *Northeastern Railroad Investigation*. Accordingly, the Commission should review the record in the instant case with vigilance. When that is done, these protesting flour millers submit that, bearing in mind the impact upon the Penn Central should the suspended tariff provisions become effective, we have another demonstrated violation of the National Transportation Policy mandate directed to achieving a rail system adequate to the needs of the commerce of the United States. The Commission is requested so to find and conclude.

## THE RESPONDENTS HAVE FAILED TO SUSTAIN THEIR BURDEN OF PROVING THE LAWFULNESS OF THE PROTESTED RATES IN VIEW OF THE UNFEASIBILITY OF THE PROPOSED UNIT TRAIN OPERATIONS THEREUNDER.

In passing on the reasonableness of proposed rates, the Commission properly takes into account both the impact on the financial condition of the carrier and the operating difficulties involved. E-Z Opener Bag Co. v. Illinois Central R. Co., 160 I.C.C. 37, 40 (1929). Carrier innovations in proposed operations and ratemaking must be consistent with the provisions of the Act and the National Transportation Policy. In fact, the lawfulness of any particular innovation is to be ". . . determined based upon the controlling circumstances and conditions, including the material economic as well as the physical facts of record, in particular situations." Coal To New York Harbor Area, 311 I.C.C. 355, 371 (1960).

We have previously demonstrated that the proposed unit train operation from the Erie's standpoint resulted in higher and higher costs as the record evolved. These costs, of course, reflect the adverse operating circumstances inherent in the proposed operation over the lines of the Erie from Chicago to Martins Creek.

The substantial evidence of record reveals that the proposed "unit train" operation from Chicago would not in fact even be a unit train operation. Originally, the Erie proposed an operation that would have involved the movement of a single, integrated train of 50 cars on an uninterrupted basis from Chicago to Martins Creek. In the face of the evidence of witness Bilz, and that of witness Wulfhorst, the Erie substantially changed its position during the course of the hearing. It then became apparent that the operation would not be a true unit train operation and would be fraught with inefficiency and utter impracticality. A succinct outline of the revised operations is contained in the record on a one-page exhibit, Exhibit 14. Witness Bilz' analysis of the proposed operation outlined some of the severe operating problems involved. (Ex. 31, pp. 31-44) Penn Central operating witness Wulfhorst also described various facets of the so-called "unit train" operation which demonstrated the unfeasibility of the Erie's plan for the handling of trains from Scranton to Martins Creek. (Ex. 24; Tr. 861-904) During cross-examination, Erie witness Cannon admitted that the proposed operation has "some uniqueness about it" compared to a classic unit train operation. (Tr. 400) The proposed operation differs radically from the Erie's handling of unit trains from Chicago to Buffalo. According to witness McGinnis, when the Eire operates Buffalo unit trains, ". . . the car and trains are not separated until arrival at destination, thus eliminating intermediate switching and all but a minimum of terminal handling." (Ex. 3, p. 4) In fact, the protested unit train operation would involve the interruption of the train 14 miles from destination at Portland, intermediate switching, and substantial additional handling at destination. (Ex. 14; R. 124)

Witness Gillette, Assistant Vice President of Operations of the Soo Line, perhaps unwittingly, pointed out during cross-examination, the extreme inefficiencies built into the Erie's proposed unit train operations. Witness Gillette testified:

> "Q. Now, at the bottom of page 10 (Ex. 15) you describe what you consider to be the characteristics of unit train service, and I take it based on your Buffalo service you have derived these factors, and you there described inter and intratrain switching as extremely time consuming in conventional service and is completely eliminated under unit train service. You also indicate that -

> well, let's stop at that. Is there any inter or intratrain switching that occurs on the existing Buffalo unit train service between, say, the Twin Ports and Twin Cities and Chicago?
>
> "A. No.
>
> "Q. Is it your view that that condition, namely, the necessity operationally for inter or intratrain switching, is basically incompatible with the concept of efficient unit train operations?
>
> "A. Yes.
>
> "Q. And it's extremely time consuming?
>
> "A. Yes, it is.
>
> "Q. And it adds expenses to the operation?
>
> "A. Yes, it does." (R. 466-7; emphasis added)

In connection with this testimony, witness Gillette's direct evidence contrasted efficient unit train service and conventional service involving ". . . intertrain and intratrain switching, which is extremely time consuming . . ." (Ex. 15, p. 10)

In addition to the serious operating problems involved in dividing the train into two cuts at Portland, and the additional handling and delays involved, there are even further operating problems which render the overall unit train proposal basically unfeasible. These are briefly discussed below.

## Use Of Erie's 3600 Horsepower Locomotive Units On The Bangor-Portland Branch Is Simply Not Feasible.

The first, and possibly fatal blow to the Erie's proposed "unit train" operation involved its belated recognition that it could not at this time utilize its 3600 horsepower locomotive units, the most expensive and heaviest in its system, on its Bangor-Portland branch where Martins Creek is located. Faced with operating testimony from witness Bilz and witness Wulfhorst on this issue, the Erie changed its position during the hearings. In order to avoid "controversy", the Erie substituted the use of three 2500 horsepower units in its plan of operations from Scranton to Martins Creek. (R. 124) Indeed, Erie's witness McGinnis even adverted to the possibility of necessary "track work" before 3600 horsepower locomotive units could be used. (R. 123) There is a substantial operating question whether 3600 horsepower units can traverse the Bangor-Portland trackage in terms of the strain of such units on existing trackage and labor restrictions. Witness McGinnis expressly admitted during cross-examination that the Erie has never run a single 3600 horsepower locomotive unit on the Bangor-Portland branch, and at the present time the Erie does not ". . . assign any local crews that size power." (R. 144) He also admitted that no operating study has been made by the Erie as to whether the Bangor-Portland tracks could withstand the strain of such heavy and powerful locomotive units. (R. 145)

Scranton is 61 miles from Martins Creek. Under the revised operations, the Erie will have to stop the train at Scranton, and substitute three smaller, 2500 horsepower locomotives for the 3600 horsepower units. As indicated in witness Bilz's testimony, the use of smaller locomotives on the unit trains, such as now proposed by the Erie, would substantially add to the locomotive portion of the gross ton-mile costs. (Ex. 31, p. 39) Moreover, the Erie has failed to submit precise costs for locomotive expense, and has relied on understated system averages as inherent in the Rail Form A formula applicable to the Erie's entire system.

### The Extreme Inefficiencies And High Costs Involved With Respect To The Erie's Proposed Use Of Crews From Scranton To Martins Creek.

We have noted previously the necessity for the break-up of the "unit train" into two separate 25-car cuts at Portland, following movement of the train powered by three 2500 horsepower locomotives from Scranton to Portland. In revising his approach to the costs, witness Cannon presupposed the necessity for six trips back and forth by crews from and to Portland and Martins Creek. (R.399) Witness McGinnis forecast the need for the use of a crew based at Croxton, New Jersey, the eastern terminus of the Erie's system. (R. 125, 213; Ex. 38) Croxton is located in the vicinity of Hoboken, New Jersey and is approximately 90 miles from Martins Creek. (Exs. 37, 38; R. 213) After placement and unloading of the first cuts of 25 cars at Martins Creek by the Bangor crew, this crew would go off duty, requiring the Erie to bring in an entirely separate crew from Croxton which would be dead-headed 81 1/2 miles from Croxton to Bangor, Pennsylvania. (R. 160, 170-171, 172-173; Exs. 14, 37) At Bangor, this foreign crew would pick up two 2500 horsepower diesel units, would move to Martins Creek, pull the empty 25 car cut, and place the second cut of loaded cars at the elevator. The crew would then move the 25 empty cars back to Portland, and then would dead-head back to Croxton. (R. 159; Ex. 14)

For every unit train handled by the Erie to Martins Creek, a separate Croxton crew based about 90 miles from Martins Creek would have to dead-head, round trip, a distance of 160 miles in order to place loaded cars and remove empties at Martins Creek. These crews would be paid a dead-head allowance for empty movements. (R. 170) In order to switch the second cut of loaded cars out of every 50 car train, the Erie would be involved in paying the Croxton crew three days wages for one day's work. (R. 397) The Erie's costs do not include a precise factor for crew wages and dead-heading expense. (R. 396)

The use of Croxton crews demonstrates the impracticality of the proposed operation which certainly is a far cry from an efficient or economical unit train service. By way of contrast, destination switching under the existing five car rate was admitted by Erie witness McGinnis to be "relatively simple" and highly efficient. (R. 147-8) Witness McGinnis in effect, confirmed protestants' evidence as to the economic and highly efficient nature of handling of five car movements at Martins Creek. (Ex. 31, pp. 25-6) During his cross-examination, witness Bilz, based on his actual inspection of the Martins Creek facilities, succinctly described handling of multiple car shipments at Martins Creek as ". . . a very simple operation." (R. 1081)

Multiple car shipments in lots of five under the existing five car rate are handled on either through or local trains to Martins Creek, with the five cars set off at Portland and switched by the Bangor crew directly to Martins Creek, where they are placed on one of three unloading tracks located adjacent to the elevator. (R. 137-138, 141-143)

There is no comparison in terms of efficiency and practicality between the handling of the five car shipments and the proposed unit train handling from Scranton to Martins Creek. The former is a model of efficiency and economy in railroad operations. The latter can only be characterized as a monstrosity with little or no resemblance to an efficient unit train operation.

### There Is A Serious Question Whether Cars Can Be Placed At The Martins Creek Elevator As Claimed By The Erie.

The Erie claims that from its Martins Creek yard, about 1/3 of a mile from the elevator, it will pull 14 cars, drop ten cars on track two and, in the same movement, place the remaining cars on track four on the other side of the elevator. (R.167, 168-9) However, operating testimony submitted by witness Wulfhorst indicates that the switch lead 24/ to track four will not physically hold a two unit locomotive pusher and four jumbo hopper cars. (R. 886-873) According to witness Wulfhorst, who has physically inspected the Martins Creek facility in detail, it would be necessary to uncouple the two unit pusher, if an appropriate machinist were available to perform this service, and to switch the remaining four cars two at a time to track four. (R. 875) Involved would be additional switching time and delays, not considered by the Erie or included in its cost analysis.

### Miscellaneous Additional Operating Inefficiencies Contribute To The Overall Unfeasibility Of The Proposed Unit Train Operation By The Erie.

The previously described operating inefficiencies are not the end of the matter. There remain additional serious

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24/ Described also as a "tail track". This track is located south of the point where tracks 1 and 2 intersect track 4, beyond roadway marked "entrance" on Exhibit 4, the Martins Creek track diagram.

operating problems which further contribute to the utter inefficiency of the proposed "unit train" operation at Martins Creek.

Under the Erie's revised version of operations, ten cars out of the first string of 14 are to be dropped on track two adjacent to the Martins Creek's elevator, with the remaining four placed on track four on the other side of the elevator. According to Erie operating witness McGinnis, cars move over the unloading pits by gravity with the grade from the south to the north. (R. 210) Ten cars placed on track two would, therefore, be positioned south of the rail pit. (See Ex. 4) Track two extends 540 feet south of the rail pit and traverses what appears to be the main entrance to the ConAgra facility. (Ex. 4) It would not be possible to place the ten cars south of the unloading pit without blocking this entrance. 25/ Necessarily, access to the facility at Martins Creek through this entrance would be blocked for some period during the unloading process.

The Erie's revised operations involve the substitution of three 2500 horsepower locomotives for two 3600 horsepower units at Scranton, some 60 miles from Martins Creek. (Ex.

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25/ The distance between the unloading pit and the entrance is 540 feet. Each jumbo covered hopper cars is approx-mately 57 to 58 feet in length. (Ex. 4; 875-876, 885)

14; R. 124) It is apparent that the governing factors, the ruling grade and the gross trailing tons that the locomotive must move over that grade, have not been calculated by the Erie. 26/ Witness Wulfhorst of the Penn Central pointed out that, as a practical matter, it is not possible to know whether the three smaller locomotive units would be adequate to handle the train from Scranton to Portland without specific knowledge of these important operating factors. (R. 868-870)

There is another operating problem involved. After placement and unloading of the second cut of 25 cars, Erie's plan calls for the return of the Bangor crew which previously had placed the first cut of cars on the tracks at the Martins Creek facility. However, as pointed out by witness Wulfhorst, when the last car of each train is unloaded, it is by no means a certainty that the Bangor crew would be available immediately for the removal of that car from the Martins Creek facility of ConAgra. That Bangor crew could well be occupied elsewhere on the Bangor-Portland branch, involving additional delay in the removal of the last cut of 25 empty cars from ConAgra's tracks back to Portland. (R. 880) Portland is approximately 14 miles from Martins Creek, and

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26/ No specific operating testimony was provided by the Erie as to these important factors.

the Bangor crew has responsibility for performing work on all segments of the Erie's Bangor-Portland branch. (R. 187) 27/

Yet, this is still not an end to the operating inefficiencies involved in the "unit train" operation. Railroad crews cannot move in the yards or on industrial tracks at speeds in excess of 15 miles per hour. These speed restrictions will apply to the Erie's handling of cars, empty and loaded, between its Martins Creek yard and ConAgra's elevator, a distance of about 1/3 of a mile. (R. 903-4) There is also the possibility of other speed restrictions, due to the condition of the track, the curves, highway crossings, etc., between Bangor and the Erie's Martins Creek yard, a distance of about ten miles. (R. 904)

The Erie ignored the need for detailed planning prior to serious consideration of the proposed service. It conducted no operating or switching studies at Martins Creek. 28/ (R. 175, 362-3, 385) It had never operated a 3600 horsepower locomotive over its Bangor-Portland branch to

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27/ The Erie trackage beyond Portland is not part of its main line but comprises its Portland-Bangor branch. (R. 174-5)

28/ Or, for that matter, at Buffalo. (R. 131)

Martins Creek. (R. 145) It had made no detailed study of the trackage, ruling grade, curves, or other physical characteristics of its line between Scranton and Martins Creek. (R. 144-5) In a word, the Erie "leaped" before it "looked" with respect to the protested rates. Indeed, during his cross examination, witness McGinnis candidly admitted the failure of the Erie to examine the operating problems involved before the rates were published. He testified:

> "Q. Were you asked to make an evaluation of these operating problems prior to the publication of this rate?
>
> "A. No.
>
> "Q. You were not. So, in effect, the rate was published without any examination of the operating problems at Martins Creek?
>
> "A. None by me.
>
> "Q. Anybody else at the Erie Lackawanna that you know of?
>
> "A. I don't know." (R. 175)

The proposed operations are totally inefficient and basically unfeasible. They bear no resemblance to an efficient unit train operation. An efficient and practical unit train operation would not involve (1) interruption of the train 60 miles from destination with substitution of crews and locomotive power, (2) inter or intra-train switching, with breakup of the train into 2 separate cuts, 14 miles from destination, (3) use of a foreign crew deadheading back and forth from a home base point about 90 miles from the receiver's location, (4) separate placement of strings of cars shuttled back and forth between a railroad yard about 1/3 of a mile from the receiver's location, and (5) obstruction of roadways or plant entrances.

When reviewed in detail, the Erie's "unit train" operation is nearly mind boggling in its inefficiencies. The protested rates are further shown to be unjust and unreasonable and in violation of Sections 1(5) and 1(6) of the Act in that they are predicated on railroad operations that are impractical and unfeasible. The Commission is requested so to find.

## OTHER ELEMENTS OF UNLAWFULNESS IN THE SUSPENDED TARIFF PROVISIONS

These flour miller protestants are reluctant unduly to protract this Brief, particularly when it is now so apparent that on several counts the suspended tariff provisions are unlawful in violation of Section 1(5), 1(6) and 3(1) of the Interstate Commerce Act and in contravention of the National Transportation Policy. These protestants will close by treating the points set forth hereinafter.

### As A Matter Of Substance, Potential Violation Embodied In Soo Line Monopoly

As is demonstrated earlier in this Brief the record is clear that ConAgra can be expected to continue to move at least 32% of its spring wheat needs at Martins Creek via exempt trucker, over the highway from Buffalo to Martins Creek. (Ex. 16, p. 12; Ex. 20, p. 8; Ex. 21, pp. 7-8; Ex. 23, pp. 5-6; Ex. 26, pp. 4-5; R. 719-720) ConAgra witness Stone categorically stated that his company did ". . . not want to be 'locked in' to any single mode or method of originating the wheat needed for our Martins Creek flour mill. . ." (Ex. 16, p. 20)

Soo Line witness Smith, on the other hand, sought to imply that the suspended tariff provisions would provide to the Soo Line a monopoly of the spring wheat moving to ConAgra at Martins Creek. He did admit he had "no commitment" to that effect from ConAgra. (R. 36, 38, 39, 51, 1219)

It is certainly pertinent to point out here that if there were a commitment on the part of ConAgra to provide 100% of the spring wheat requirements at Martins Creek to the Soo Line (or indeed a very substantial percentage thereof), such a restriction would stand condemned by this Commission. See Great Lakes Ship Owners Association v. Chicago & North Western Railway Co., 337 I.C.C. 287; 341 I.C.C. 272. Indeed, there is solid reason to believe that one of the reasons the Commission, Division 2 suspended the earlier Soo Line tariff was because of such a restriction, conferring a monopoly or substantial monopoly. We refer, of course, to the prior tariff provisions in the Fall of 1972 suspended in I.&S. No. 8784, Wheat, Annual Volume Rate, Minn. & Wisc. to Martins Creek, Pa. This was suspended by Division 2 on September 15, 1972 and subsequently withdrawn by the respondent lines.

## ConAgra's References To Railroad Service At Buffalo Are Unwarranted And Do Not Justify The Suspended Tariff Provisions.

In seeking to justify the suspended rates, ConAgra, in highly generalized terms, has been critical of railroad service out of Buffalo, N.Y. Presumably, ConAgra was referring to the use of the Erie in moving wheat by rail from Buffalo to Martins Creek under the 5-car rate of 43¢ per cwt. (Ex. 16, pp. 12-13, 20-21; R. 518) The substantial and probative evidence of record demonstrates that the rail service out of Buffalo via the Erie and the Penn Central is reasonable, adequate and improving. Experienced industrial traffic executives, testifying for the protesting flour millers, whose companies are dependent upon the Erie and the Penn Central for the movement of flour out of Buffalo have testified that the railroad service at Buffalo, compares favorably with the railroad service at other major rail terminals such as Kansas City, Chicago and Minneapolis. (Ex. 18, p. 9; Ex. 19, p. 5; Ex. 23, p. 6; Ex. 25, p. 8; R. 581, 594, 620, 636, 843)

Actually, the record reveals that the rail service out of Buffalo is substantially superior to the rail service out of Kansas City. Witness Hackbart, General Traffic Manager, The

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* This 5-car rate on wheat of 43¢ per cwt. (subject to any later general Ex Parte rate increases, is also available to ConAgra via the Penn Central from Buffalo to Martins Creek, pursuant to a reciprocal switching arrangement between the Erie and the Penn Central. (R. 523-525)

Pillsbury Company, referred to a record kept in the regular course of business by Pillsbury, in the first six months of his company's 1974 fiscal period (June through November, 1973). Witness Hackbart testified:

> "Our experience at Buffalo is ninety-one percent of our cars during that period have arrived on time; Kansas City sixty-eight percent. Our experience shows that Buffalo has one of the best records of service during those six months of any place in the country." (R. 846) (See R. 854, 855)

It goes without saying that whatever problems might conceivably exist for ConAgra with respect to rail service at Buffalo, they do not, even in theory, exist when, as has been the case, ConAgra utilizes exempt truck transportation for the movement of wheat from Buffalo to Martins Creek. (Ex. 20, p. 8; Ex. 21, p. 10; Ex. 23, p. 5; Ex. 26, p. 5; R. 736, 737)

Unspecified reference to some particular emergency situation most certainly is compatible with reasonable and adequate rail service from Buffalo. "One swallow does not make a summer!"

It is also appropriate to note that it would come with ill-grace for the Erie, if such were the case, to try to justify the suspended rates by reliance upon alleged inefficient rail service on the part of the Erie from Buffalo to Martins Creek. Witness Barber, Assistant Vice President - Marketing & Pricing of the Erie, at transcript page 227, testified as follows:

> "Q. In your opinion, is the Erie an efficiently operated railroad?
>
> "A. A what?
>
> "Q. Efficiently operated railroad.
>
> "A. That's a difficult question to answer, Mr. Donelan. Within the capabilities of our property, I think that we are more efficiently operated than most other carriers under similar circumstances, yes, sir.
>
> "Q. And it is a fact, is it not, that the Erie continually exerts efforts to make itself more efficient in serving the public?
>
> "A. Absolutely.
>
> "Q. And that applies throughout the system, does it not?
>
> "A. It does.
>
> "Q. And that applies, among other places, at Buffalo, does it not?
>
> "A. Yes, sir." (R. 226-227) (Emphasis added)

ConAgra's aspersive comments in the record with respect to railroad service at Buffalo are unwarranted and most certainly do not justify the suspended unit train tariff. The Commission is requested so to find and conclude.

## MISCELLANEOUS MATTERS RAISED IN THIS RECORD

These protestants are reluctant to protract this Brief. We have endeavored to cover all the points which are pertinent, in our effort to assist the Commission both in analysis of the record and in its decision in this important case.

### Available Wheat Supply From Buffalo For ConAgra At Martins Creek

ConAgra has also endeavored to justify the suspended rates by somewhat vague references to unspecified problems in obtaining wheat from Buffalo to be milled at Martins Creek. We have already, in a sense, covered this matter, previously in this Brief. Witness Stone has admitted on the record that two flour milling firms, with elevator facilities at Duluth-Superior and at Buffalo, were not only eager but, in Mr. Stone's words, ". . . very eager to sell ConAgra wheat delivered in rail cars or trucks at Buffalo. . ." (Ex. 16, p. 10; R. 490) Other flour milling companies, with wheat in storage at Buffalo, are willing to negotiate the sale of wheat to ConAgra, but have not been asked to do so. (Ex. 18, p. 3; Ex. 24, p. 4) In addition, of course, ConAgra has the same option as other flour milling companies to arrange the purchase of wheat at origins such as Duluth-Superior, arrange for the movement of the wheat via either the lake or the rail routes to Buffalo, arrange storage of the wheat and provide for its movement from Buffalo to Martins Creek either by railroad or by truck. (Ex. 19, pp. 4-5; R. 547, 548, 549, 583, 584, 632)

ConAgra's intentional decision _not_ to pursue available sources of supply of wheat via Buffalo, when the wheat is available there, most certainly does not justify the suspended tariff provisions. _The Commission is requested so to find and conclude_.

### _The Suspended Tariff Provisions Embody A Change In Rates Within The Meaning Of Section 15(7) Of The Interstate Commerce Act._

The provisions of the suspended tariff are set forth in Appendix 3 to Exhibit 1 of record. Item 130 thereof treats the subject of application of the rate and consecutive movements. Paragraph (D) takes note of the situation where the tonnage required of a consignee is not met. It further refers to the application of rates in Section 2 of WTL 332-H, I.C.C. No. A-4864 and Item 5036 of TLCTR C/TN 245-I, I.C.C. C-375. The actual text of paragraph (D) of Item 130 of the suspended tariff is as follows:

> "(D) If the tonnage required of a consignee is not met, rate in item making reference to this item shall not be applicable on shipments that have moved unless the charges resulting from application of rates in Section 2 or WTL 332-H I.C.C. No. A-4864 and Item 5036 of TLCTR C/TN 245-1, I.C.C. C-375 exceed the lowest charge that would have been collected if the tonnage requirement had been met. In this event, the deficit in tonnage shall be billed at the applicable rate in this tariff and be collected by the Erie Lackawanna Railway Company and such revenue will be prorated as agreed upon between carriers participating in the rate."

The foregoing tariffs cited in the above-quoted language reflect the combination of the single car proportional from Duluth-Superior, et al. to Chicago and the proportional from Chicago to Martins Creek on a single car rate basis. The suspended tariff provisions merely change the applicable rates over the same route of transportation service, provided certain specified conditions are met.

Thus, there can be no indulgence in pettifogging or hair-splitting to negate the fact that the burden of proof of the reasonableness of the changed, reduced rates here involved is upon the respondents. See Petroleum Coke, Texas to Baton Rouge and New Orleans, 248 I.C.C. 291 at 296; Sugar, Boston to New England, 251 I.C.C. 319 at 320; Abrasives From Worcester, Mass. To Philadelphia, Pa., 251 I.C.C. 400, 403. The Commission is requested so to find and conclude.

## CONCLUSION

From all the foregoing it is apparent that this Commission, Division 2, with substantial reason, correctly issued an order of suspension and investigation with respect to the instant rates. As demonstrated above, the suspended tariff provisions are completely incompatible with the requirements of the National Transportation Policy and are in fundamental violation of Sections 1(5), 1(6) and 3(1) of the Interstate Commerce Act. The suspended tariff provisions are especially to be condemned because of their serious impact upon the Erie Lackwanna because of the unjustified and unlawful dissipation of revenues which would be necessarily involved. The Commission should order the suspended tariff provision cancelled - as not shown to be just, reasonable and otherwise lawful. We so pray.

## REQUEST FOR INITIAL DECISION BY THE ENTIRE COMMISSION

Earlier in this Brief we pointed out that the Erie is presently in bankruptcy before the U. S. District Court for the Northern District of Ohio, Honorable Robert B. Krupansky presiding. There, time is of the essence in reaching the determination whether the Erie can emerge from bankruptcy as a viable carrier or whether it is to be incorporated as an integral part of the railroad system contemplated under the Regional Rail Reorganization Act of 1973, Public Law 93-236, 87 Stat. 985.

As earlier noted, in the absence of a final decision by this Commission prior to the end of the seven months suspension period under Section 15(7) of the Act, the railroad respondents have indicated their categorical intention of placing the rates into effect, the spokesman being Counsel for Soo Line. (R. 1296) The record further reveals that in the negotiations which led to the suspended tariff provisions Soo Line did not so much as inquire into the precarious financial status of the Erie. (R. 53)

Under all these circumstances the public interest clearly requires that we have here an appropriate, admittedly unusual case where the Initial Decision should be by the entire Commission. Such a request is here made.

Dated at Washington, D. C. this 25th day of March, 1974.

Respectfully submitted,

Peavey Company
Minneapolis, Minnesota 55415

The Pillsbury Company
Minneapolis, Minnesota 55415

Standard Milling Company
Kansas City, Missouri 64105

ADM Milling Company
Shawnee Mission, Kansas 66211

## ATTACHMENT NO. 1

Appendix D (Revised) to Verified Statement
Exhibit No. 18 of Witness James R. Scoggin
(in response to Exhibit 16 - attached
Exhibit No. 4)

Appendix D (Revised)

## ADJUSTMENTS TO STONE'S EXHIBIT 4: TRANSPORTATION COSTS FOR BULK FLOUR DELIVERY TO OFF-TRACK SITES AT PHILADELPHIA, BROOKLYN, JAMAICA AND HACKENSACK

| To Philadelphia, Pa. | Per Cwt. |
|---|---|
| Via Martins Creek, as shown in Stone's Ex. 4 | $1.0325 |
| Via Buffalo, as shown in Stone's Ex. 4 | .8800 |
| Adj. 1 - Wheat to Buffalo, shown costs of 30¢ stated to be based on 1972 costs. Using 1973 costs indicated in Stone's statement, page 11; 3.5 months unit train at 43¢ and 8.5 months cross lake at 25¢ to 26.67¢ produces average cost of 30.84¢. Note, 1974 cross lake charges not known. | .0084 |
| Alternate Adj. 1 - Basis Peavey costs for 1973* | .0285 |
| Adj. 2 - Added rental cost of using airslide cars from Buffalo, basis net car rental per Peavey experience January-August 1973. | .0607 |
| Adj. 3 - Car cleaning costs at Buffalo - Basis Peavey experience. | .0117 |
| Adj. 4 - Added cost of transferring bulk flour through Rollins Terminal, Norristown, Pa., and local cartage to Philadelphia; transfer 3¢ cwt., sifting 1¢ cwt., cartage via Matlack 26.5¢ cwt. #Note, storage charges at Norristown, if any, not included. | .3050 |
| Total adjusted charges via Buffalo. | 1.2658 |
| Total adjusted charges using Alternate Adj. 1. | 1.2859 |
| To Brooklyn and Jamaica, N.Y. | |
| Via Martins Creek, as shown in Stone's Ex. 4 | 1.0725 |
| Via Buffalo, as shown in Stone's Ex. 4 | .8800 |
| Adj. 1 - Wheat to Buffalo, same as shown to Philadelphia. | .0084 |
| Alternate Adj. 1 - Same as for Philadelphia. | .0235 |

#Effective January 7, 1974. See Bulk Carrier Conference, Inc., Agent Freight Tariff 118A, MF ICC No. 140, Supplement 2, Section 2.

| | |
|---|---|
| Adj. 2 - Added airslide car rental cost, same as shown to Philadelphia. | .0607 |
| Adj. 3 - Car cleaning cost, same as shown to Philadelphia. | .0117 |
| Adj. 4 - Added cost of off-track delivery through Brooklyn East District Terminal for transfer and local delivery by Tri-Borough Transportation Corporation. | .1200 |
| Total adjusted charges via Buffalo. | 1.0808 |
| Total adjusted charges using Alternate Adj. 1. | 1.1009 |
| To Hackensack, N. J. | |
| Via Martins Creek, as shown in Stone's Ex. 4. | 1.0425 |
| Via Buffalo, as shown in Stone's Ex. 4. | .8800 |
| Adj. 1 - Wheat to Buffalo, same as shown to Philadelphia. | .0084 |
| Alternate Adj. 1 - Same as for Philadelphia. | .0285 |
| Adj. 2 - Added airslide car cost, same as shown to Philadelphia. | .0607 |
| Adj. 3 - Added car cleaning cost, same as shown to Philadelphia. | .0117 |
| Adj. 4 - Added cost of off-track delivery through Brooklyn East District Terminal. Same as shown to Brooklyn except local delivery charges are 18¢. | .1800 |
| Total adjusted charges via Buffalo. | 1.1408 |
| Total adjusted charges using Alternate Adj. 1. | 1.1609 |

*Peavey's actual cross lake experience during the 1973 navigation season was that the average cost to move grain from Duluth-Superior to Buffalo including brokerage, freight, overtime charges, vessel demurrage, and maritime insurance was 17.20¢ per bushel, or 28.67¢ per cwt. of wheat. Factoring this by 8.5 months at 28.67¢ and 3.5 months at 43¢ for unit trains during the closed navigation season produces an average cost of 32.85¢ cwt., 2.85¢ more than shown in Stone's Exhibit 4 and 2.01¢ higher than shown above.

## ATTACHMENT NO. 2

### Tonnage Increases Necessary Under Protested Rates Before Erie Could Break Even With Contribution Under Existing Five Car Rate

**BASIS A:**

| | | |
|---|---|---|
| Total Contribution Under Five Car Rate With Movements In Erie Cars: | | $335,580 |
| Per Cwt. Contribution Under Protested Rates With Movements In Soo Cars: | | 19.0¢ |
| Volume Necessary To Equal Contribution Under Five Car Rates: | $\frac{335,580}{.190}$ | = 1,766,211 cwts. |
| Added Volume Above Present Volume Required To Break Even At Unit Train Rates: | | 1,766,211 cwts.<br>- 1,428,000 cwts.<br>338,211 cwts. |
| Percent Of Total Necessary Break Even Volume To Total Martins Creek Grind Requirements: | $\frac{1,766,211}{2,100,000}$ | = 84% |
| Percent Of Necessary Increase In Volume Over Present Volume: | $\frac{338,211}{1,428,000}$ | = 24% |

**BASIS B:**

| | |
|---|---|
| Total Contribution Under Five Car Rate With Movements In Erie Cars: | $335,580 |
| Per Cwt.Contribution Under Protested Rates With Movements In Soo Cars: | 20.5¢ |

Attachment No. 2
Page 2 of 2

| | | |
|---|---|---|
| Volume Necessary To Equal Contribution Under Five Car Rates: | $\frac{335,580}{.205}$ | = 1,636.976 cwt. |
| Added Volume Above Present Volume Required To Break Even At Unit Train Rates: | | $\begin{array}{r} 1,636,976 \\ - \underline{1,428,000} \\ 208,976 \end{array}$ cwt. |
| Percent Of Total Necessary Break Even Volume To Total Martins Creek Grind Requirements: | $\frac{1,636,976}{2,100,000}$ | = 78% |
| Percent of Necessary Increase In Volume Over Present Volume: | $\frac{208,970}{1,428,000}$ | = 15% |

Source: Ex. 31, Table 1, Sheet 1, p. 16; Revised per Transcript 1090,1095

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## INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8899

# UNIT TRAIN RATES ON WHEAT, MINN. & WIS. TO MARTINS CREEK, PA.

INVESTIGATION AND SUSPENSION DOCKET NO. 8899

# UNIT TRAIN RATES ON WHEAT, MINN. & WIS. TO MARTINS CREEK, PA.

*Decided June 18, 1974*

Proposed unit train rate on wheat from Minneapolis, Minnesota Transfer, and St. Paul, Minn., to Martins Creek, Pa., to apply during the season of open navigation on the Great Lakes found to violate section 3(1) of the act. Proposed unit train rates from Minneapolis, Minnesota Transfer, St. Paul, and Duluth, Minn., and Superior, Wis., to Martins Creek to apply during the season of closed navigation on the Great Lakes and from Duluth, Minn., and Superior, Wis., to Martins Creek to apply during the season of open navigation, found just and reasonable and not otherwise unlawful. Schedule ordered canceled without prejudice to the filing of a schedule in conformity with the views expressed and findings made. Proceeding discontinued.

*J. T. Clark* and *C. Harold Peterson* for respondents.

***Donald Macleay*** **and** ***Peter A. Greene*** **for intervener in support of respondents.**

*John F. Donelan* and *John H. Caldwell* for protestant flour mills.

*Robert Szwajokos* for protestant Penn Central Transportation Company.

*Scott H. Elder* for protestant Lake Carriers' Association.

*Frank E. Polom* for protestant Board of Trade of the city of Chicago.

*Robert H. Smith* for protestant Seaway Port Authority of Duluth and International Association of Great Lakes Ports.

*Edward T. Brick* for protestant Buffalo Area Chamber of Commerce.

*Richard Max McCarthy* for protestant Stanley M. Makowski, Mayor of the city of Buffalo.

*Justyn E. Miller* for protestant county of Erie, N.Y.

*David Mix* for protestant Niagara Frontier Transportation Authority.

*Jon C. Hansen* for the Board of Trade of Kansas City, Mo., as its interests may appear.

## REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS BROWN, HARDIN, AND CLAPP

BY DIVISION 2:

Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of an initial decision. Requested findings not specifically discussed in this report nor reflected in our findings and conclusions have been considered and found not justified or resolution thereof not necessary for the proper disposition of this proceeding.

By schedule filed to become effective November 1, 1973, the Soo Line Railraod Company (Soo) and Erie Lackawanna Railway Company (Erie) published in Soo Line Freight Tariff 543-B, I.C.C. 7837, unit train proportional rates[1] on wheat in bulk from Duluth, Minneapolis, St. Paul, and Minnesota Transfer, Minn., and Superior, Wis., to Martins Creek, Pa. Protests were received from numerous shipper, port, carrier, and community interests, and by order dated October 31, 1973, the Commission, Appellate Division 2, instituted an investigation of the lawfulness of the rates and suspended their operation to and including May 31, 1974. On January 2, 1974, the same body denied a petition by respondents and by ConAgra, Incorporated, the shipper supporting respondents, seeking vacation of the Order of Suspension.

All parties circulated their affirmative evidence by verified statements filed prior to the hearing. Hearing for the purpose of cross-examination and development of supplemental evidence was held at Washington, D.C., from January 28 through February 5, 1974. Evidence in opposition was offered by six flour mills—Peavey Company, The Pillsbury Company, Standard Milling Company, ADM Milling Company, Ross Industries, Inc., and International Multifoods Corporation and by Penn Central Transportation Company, Lake Carriers' Association, Seaway Port Authority of Duluth and International Association of Great Lakes Ports, Niagara Frontier Transportation Authority, the Buffalo Area Chamber of Commerce, and the Board of Trade of the city of Chicago. Position papers were presented by the United States Maritime Administration, the county of Erie, N.Y., and the Mayor of Buffalo. No evidence or position paper was offered by the Kansas City, Mo., Board of Trade. Briefs were filed by respondents and the intervener in support of respondents, collectively by the flour mill protestants, and individually by the Seaway Port Authority of Duluth and International Association of Great Lakes Ports, Lake Carriers' Association, Penn Central, and the Chicago Board of Trade.

By schedules filed to become effective June 1, 1974, the respondents have filed a supplement to the tariff under consideration herein which increases the 72.25-cent rate by 6 cents to 78.25 cents. This is the same date the suspension runs out. The rates became effective on June 1, 1974, and are 78.25 cents and 88 cents. For convenience, in this report the rates are referred to as proposed rates even though they are in effect. Time and the prospect of further delay did not permit a revision in the report to reflect the increase. The report was prepared on the basis of the 72.25-cent rate and the cost and other evidence is discussed in these terms. However, we can and do take official notice of the fact that the rate is 78.25 cents. We find further that the increase of 6 cents does nothing to change the ultimate findings and conclusions. In fact, this increase lessens the import of some of the protestants' objections.

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[1] Rates are stated in amounts per 100 pounds.

## THE PROPOSAL

At the Ex Parte No. 299 level, the proposed basis is a rate of 72.25 cents to apply from November 1 through December 14, 1973, and from April 1 through September 15, 1974, and a rate of 88 cents to apply from December 15, 1973, through March 31, 1974. The lower rate applies during the season of open navigation on the Great Lakes, while the higher rate covers shipments moving during the season of closed navigation. The rates will expire with September 15, 1974, but if they are found lawful respondents may republish them on a year-to-year basis. The rates apply on wheat, in bulk, in covered hopper cars with a capacity of 4,500 cubic feet or more. The minimum weight is 190,000 pounds per car and 5,000 tons per train. Each shipment must comprise three consecutive train movements with an aggregate minimum weight of 15,000 tons. The same rules govern application of both rate levels. A train will consist of about 50 covered hopper cars. The participating carriers are Soo from the stated origins to Chicago, Ill., and Erie beyond to Martins Creek. Twenty-four hours free time is provided at origin for loading and 36 hours at destination for unloading. A train not released at origin within the free time will be assessed a charge of $475 for each 24 hours or fraction thereof that it is held beyond the free time. The corresponding charge at destination for cars not released within the free time is $9.50 a car for each 24 hours or fraction thereof. The division agreement provides that Soo is to receive 35 percent and Erie 65 percent of the proposed rates. At the 72.25-cent level 25.25 cents goes to Soo and 47 cents to Erie. The higher 88-cent rate is divided 31 cents to Soo and 57 cents to Erie.

### RESPONDENTS' EVIDENCE

By way of background, respondents in the fall of 1972 published a unit train rate of 62.50 cents on wheat with an annual volume requirement of 100,000 tons from and to the same points involved here. The rate was published at the request of ConAgra, the intervener in support of the rate here under investigation. There were numerous protests and the proposal was suspended and made the subject of investigation in Investigation and Suspension Docket No. 8784, *Wheat, Annual Volume Rate, Minn. and Wis., to Martins Creek, Pa.* Subsequently, respondents canceled the rate and the proceeding was discontinued.

Respondents and ConAgra resumed discussion in the spring of 1973 seeking to find a basis for publication of a rate which would be mutually satisfactory. The shipper insisted that the proposed rate must approximate the costs incurred in moving wheat to Martins Creek by alternative means of transportation. Respondents determined that water carriers during the spring of 1973 were charging up to 16 cents a bushel or 26.67 cents per 100 pounds for transporting wheat from Twin Ports (Duluth-Superior) to Buffalo. The cost of elevating the grain at Buffalo (transferral from vessel to elevator and from elevator to railcar) was known to be 5 cents a 100 pounds. The cost of service beyond Buffalo was the 40-cent five-car rate published by Erie to Martins Creek. The combination of the above factors produces a through charge of 71.67 cents. ConAgra agreed it would use unit train service if the rate during the navigation season did not exceed 72.25 cents. In 1973, nonregulated motor carriers transported wheat from Buffalo to Martins Creek at charges ranging from 33.33 cents to 36.67 cents, or an average of 35 cents, but the charge for this mode of service was ignored in computing ConAgra's alternative costs. During the nonnavigation season the alternative costs were figured to include the Buffalo unit train rate of 43 cents, elevation charge of 5 cents, and the 40-cent rate from Buffalo to Martins Creek, producing a through charge of 88 cents which ConAgra agreed would be acceptable. Again the charge agreed upon did not take into account the lower cost of nonregulated motor carrier service from Buffalo to Martins Creek.

In setting the level of the proposed rates respondents did not intend to go any lower than necessary to meet the alternative transportation costs available to the shipper. In evaluating the alternative costs they took into account the 1973 vessel charges, but it is intended that the proposed rate will be subject to all general increases authorized since the original November 1, 1973, effective date. Thus, there is built into the rate certain cost escalations which conceivably could approximate the amount of the 1974 charge for wheat moving in lake vessels. ConAgra has been advised of respondents' intentions to apply the aforementiond increases. In negotiating the rate level respondents did not consider the effect on the price of flour in the eastern markets.

The terms governing application of the proposed rates and the objectives sought to be achieved are said to be much the same as those associated with the Buffalo unit train rate which became effective on January 2, 1964, on wheat in unit train movements from Twin Ports and Twin Cities (Minneapolis-St. Paul) to Buffalo.

Buffalo is the largest flour milling center in the country. Much of the hard spring wheat produced in the Dakotas and Minnesota moves to Twin Ports and from there by exempt lake vessel transportation to Buffalo where it is made into flour. Buffalo's proximity to water, the great number of mills located there, and its closeness to the eastern consuming market have all contributed to make it an important flour milling center. In 1972, lake shipments of domestic wheat from Twin Ports totaled 45,322,000 bushels of which 45,058,000 bushels moved to Buffalo. The water carriers which move this traffic are exempt from regulation and their charges vary, within certain limits, with supply and demand. Until 1964, the railroads were a standby service handling only nominal tonnages as, for example, when demand for flour made it impossible for the Buffalo mills to wait the opening of the navigation season. Thus, in December 1963, the single-car rate on wheat from Twin Ports to Buffalo was 72.5 cents or about three times higher than the average water carrier charge. The Buffalo unit train rate established by the Soo and others the following month was 33.5 cents or a reduction of about 54 percent over the farmer single-car rate. With the Ex Parte No. 299 increase the rate is now 43 cents. As of January 1, 1974, the single-car rate at the Ex Parte No. 299 level was $1.05 comprised of a 37-cent factor to Chicago and 68 cents from Chicago to Buffalo. This rate applies from both Twin Ports and Twin Cities.

The reduction was made after a study of the water carrier charges and the cost to the mills of storing wheat in lake vessels at Buffalo during the period of closed navigation. The reduced rate merely met the alternative costs available to the Buffalo mills and, therefore, could not affect the market price of flour in the eastern market. It was protested by many of the same interests as are opposing the instant rate, but was not suspended though made the subject of investigation. It was eventually found to be lawful in docket No. 34381, *Wheat in Multiple Car Shipments, Minnesota and Wisconsin to Buffalo, New York* (not printed).

Since the January 1964 effective date Soo and its Chicago connections, including the Erie, Norfolk & Western, and Penn Central, have handled many unit trains during the seasons of closed navigation. Beginning with the 1969-70 winter season through the 1972-73 period, Soo originated 26, 25, 50, and 33 trains comprising 1,300, 1,250, 2,556, and 1,825 cars, respectively. Most originated at Twin Ports. The great volume of wheat available at that point is believed to be the reason for the predominance of this market. From 1969 through 1973, an average of 5.7 million bushels of wheat moved yearly, or an amount which was slightly less than the amount held by the lake vessels in winter storage at Buffalo. The above figure is about 8.7 percent of the 65 million bushels of grain moving yearly over the Great Lakes in domestic service. It is expected that the proposed rate will move an additional 3.5 million bushels or 2.1 million hundredweight of wheat which will otherwise move by water transportation or slightly more than 5 percent of the total domestic movement over the Great Lakes. The above figures represent ConAgra's anticipated yearly wheat requirements.

There has been no storage of grain in lake vessels during the 1974 season of closed navigation but this is not attributable to the Buffalo unit train rate. Rather it is because of the high costs of owning wheat held in storage at lakeside Buffalo. In 1964, wheat was selling at $1.50 a bushel while now it is $6 at Buffalo. From about mid-December 1973 to April 1, 1974, Soo expects to originate about 60 trains at Twin Ports for movement to Buffalo. This does not include unit trains which might be originated by other lines. Burlington Northern publishes a rate on the same level as maintained by Soo, but only from Twin Cities. The Chicago North Western holds out a unit train rate of 48 cents from both Twin Cities and Twin Ports. This rate permits use of boxcars or covered hopper cars.

As of the hearing Soo owned 1,108 aluminum covered hopper cars and 946 steel covered hopper cars. Of the total number of 2,054 units, 200 were acquired shortly before the hearing. An additional 100 covered hoppers will be received in October 1974. During the past 7 years the ownership of covered hoppers has increased from 600 to over 2,000 cars. Pursuant to the governing car service regulations respondent could dedicate 277 covered hopper cars to unit train service, but it has elected to use less than this number. Though it is contemplated that the train to Martins

Creek will comprise 50 covered hoppers, more cars could be included up to a train maximum gross weight of 8,500 tons. Soo has an understanding with Erie and ConAgra that it will furnish equipment for the Martins Creek trains. It considers that the tariff provision requiring the consignee to receive 3 consecutive trains of 50 cars to be advantageous both to it as well as ConAgra and does not believe that the commitment of this many cars will adversely affect its obligations to meet the car supply needs of other shippers. The cars dedicated to ConAgra will not be available to other shippers until there have been three consecutive movements. If ConAgra then offers another shipment the cars will remain intact until the movement is completed.

Like all railroads, Soo is experiencing a shortage of grain cars and decisions must constantly be made as to the use which is to be made of the available equipment. All the carriers which participate in the Buffalo unit train rate furnish cars according to an understanding which the participants mutually agree upon, but the Soo witness had no knowledge as to the number of cars which Erie agreed to furnish, nor did he know whether the number will be greater in the 1973-74 season than for prior periods. Respondent Erie stated that as the volume of the Buffalo unit train traffic increased in 1973-74 it has had to increase its commitment of covered hopper cars. Equipment used in moving traffic under the Buffalo unit train rate may continue in that service for any number of consecutive movements. No shipper cars are used in this service. Soo concedes that in recent weeks it has not been able to provide all the cars needed for the unit trains to Buffalo and shippers have had to persuade other carriers to provide a goodly portion of the cars required. However, freight cars have been committed to the Buffalo unit train during the current season for the account of International Multifoods, General Mills, Standard Milling, and Peavey. The latter's mill at Superior is switched by the Chicago North Western. The turnaround time for equipment furnished this account between Superior and Buffalo in 1972-73 was 15 days. Respondent believes this is too long and that Chicago North Western has an obligation to provide Peavey with cars.

Like the Buffalo unit train rate, the considered rates apply from both Twin Ports and Twin Cities. The latter was included in the Buffalo adjustment at the request of certain Buffalo millers. It is pointed out that for many years Twin Cities and Twin Ports have received the same treatment from country origins and to the gulf and Atlantic ports. Respondents submit that if and when other railroads join in the proposed rate. Twin Cities will be an intermediate point over the route segment from Twin Ports to Chicago, but they do not name the railroads of which this is true.

Though respondents submit that the proposed rates are modeled after the Buffalo unit train rate, there are a number of differences which protestants submit make the current proposal more advantageous. Foremost among these is that in the event ConAgra furnishes its own freight cars it will receive an allowance. There is no comparable provision in the Buffalo unit train tariff. The proposed tariff provides that when a holiday falls on a Sunday, the following Monday is a free day, contains a shipper disability rule, and sets forth the carrier's obligation in the event a car breaks down. There are no comparable provisions in the Buffalo unit train tariff but, with respect to all the aforementioned, respondents indicate a willingness to change the earlier publication to conform to the Martins Creek tariff.

Soo has had experience handling unit trains from the Twin Ports or the Twin Cities to its Chicago connections and on the basis of this experience it is able to project the manner in which the Martins Creek train will be handled. There are many characteristics inherent in unit train operations, vis-a-vis conventional train service, which contribtute to overall efficiency and improved equipment utilization. For example, intertrain and intratrain switching, which is extremely time consuming in conventional service, is completely eliminated. Little clerical work is involved in billing unit grain trains. The shipper tenders the bill of lading at Superior or at Shoreham yard in Minneapolis. The billing clerk prepares one "gang" waybill for the 50 cars. The bill contains the initials and numbers of the cars comprising the train and certain other data describing the shipment. The waybill accompanies the train to destination. A data processing clerk prepares 2 IBM cards for each of the 50 cars to provide the data processing system with essential information. Little else in the way of clerical work is required for handling unit trains. On orindary trains a waybill showing rates and routing must be prepared for each car.

Set out in appendix A is a description of unit-train service based upon the Soo's actual handling of unit trains of 50 or more covered hoppers over the last several years. There are a wide variety of circumstances which might require minor modifications of the operation, but generally the description is accurate. Based upon such actual experience no difficulty is anticipated in completing the trip from Twin Ports or Twin Cities to Chicago and return in 4 days.

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The transit time from Chicago to Martins Creek is expected to require 36 hours, as is the return of the empty cars. Completion of the line-haul round trip in 72 hours requires that the train travel an average of 606 miles every 24 hours, which Erie believes to be entirely feasible. The unloading time at Martins Creek is anticipated at 36 hours resulting in a total round trip elapsed time of 108 hours or 4 1/2 days. Allowing another 12 hours for the interchange with the Soo produces a total of 120 hours or 5 days turnaround time. Erie believes that the movement can be accomplished in less than 5 days.

Erie has successfully handled unit grain trains received from Soo and the Chicago North Western at Chicago for many years. These trains comprising up to 65 cars are tendered as a unit. Once an Erie caboose and motive power are attached the train moves through to the destination terminal with no further handling of the cars. The record is not entirely clear but it appears that unit trains destined to the Standard Milling elevator at Buffalo are delivered in 20-car cuts. The distance from Chicago to Buffalo is 696 miles and four crews are required to operate the train. The return of the cars is in a single intact group and the running time in each direction is 24 hours. During the 1972-73 grain-train season 10 unit trains were moved. A unit train originated in Chicago and tendered by a connecting line would be handled in the same way as respondent presently handles such trains to Buffalo and as it contemplates doing to Martins Creek.

Respondents' total operating revenue (Soo and Erie) under the present Buffalo unit train rate is 43 cents per 100 pounds, $877 per car, and $43,860 per train. The proposed rate during the season of open navigation will yield 72.25 cents a 100 pounds, $1,474 per car, and $73,695 per train. During the closed season of navigation the corresponding figures are 88 cents, $1,795, and $89,760. In comparison with the Buffalo unit train rate, the proposed rate at the 72.25-cent level will yield 68 percent more revenue while the 88-cent proposed rate will yield more than 100 percent greater revenue. Assuming that Soo handles 19 trains at the 72.25-cent rate and 2 trains under the 88-cent rate, which is the approximate number required to meet ConAgra's requirements, about $184,000 additional revenue would be realized over and above that realized from the Buffalo unit train rates. Respondents concede that net income or the excess of revenue over costs is the really important criteria for measuring the worth of a given rate. Comparison of the proposed rates with the unit train rate to Buffalo as well as multicar or unit train export rates to New Orleans, La., Baltimore, Md., and Norfolk, Va., shows that the revenue per ton-mile under the proposed rate is 0.0126 cents from Duluth, which is higher than that realized by any of the compared rates. Generally export rates are lower than domestic rates. Soo concedes that some of the traffic which it has heretofore handled to Buffalo undoubtedly was destined to Martins Creek, and that if the proposed rates are approved it will no longer participate in this traffic, but any loss will be more than made up by the revenue realized under the proposed rate. Respondent submits that the Buffalo unit train rate produces no net income.

Erie's main line extends between Chicago and New York, N.Y. The company has several branch lines with the most important being the one between Buffalo and Hornell, N.Y. At the latter point the branch joins the main line. Other railroads serving Buffalo besides Erie are Norfolk & Western, Penn Central, C&O-B&O, and the Buffalo Creek. The latter is jointly owned by Erie and the Lehigh Valley. Erie an affiliate of Norfolk & Western, entered reorganization under section 77 of the Bankruptcy Act on June 17, 1972. Respondent serves the mills at Buffalo either direct, through reciprocal switching, or terminal railroad switching. In addition, it serves flour mills at Baldwinsville, N.Y., Clifton, N.J., and, of course, Martins Creek.

Erie presently moves wheat on behalf of ConAgra from Buffalo to Martins Creek at the five-car rate of 40 cents. The shipments originate at elevators served direct or those served by the Buffalo Creek Railroad. All cars handled at Buffalo except those in unit trains move through Bison Yard, operated jointly by Erie and Norfolk & Western. Respondent's Buffalo terminal is said to be congested. Seventeen inbound and 11 outbound Erie trains and 6 inbound and 6 outbound Norfolk & Western trains comprising 3,435 cars move through the terminal each day. In addition, 430 cars are delivered daily to connections and about the same number are received from connections. Forty-one interchange and industry engines work out of the yard and there are extensive piggyback and automobile loading operations.

Though Bison Yard has been modernized by installation of an electronic humping section, the congestion and weather frequently conspire to bring about delays in the handling of freight cars. Cars of wheat loaded at the Standard Milling elevators are pulled from the elevators between 4 p.m. and midnight and brought 3 or 4 miles to the SK Yard. Between midnight and 7 a.m. another crew brings the cars to Bison Yard again about 3 or 4 miles in cuts of 60 to 65 cars which are pushed to the crest of the hump from which point they run by gravity to 1 of 48 classification tracks. An effort is made to place the Martins Creek cars onto a classification track set aside for cars destined to Portland, Pa., and in time to be included in train BC-2 which departs Buffalo at 11:30 a.m. for Hoboken, N.J. Usually special handling is required for the cars to make this connection, but it is not always possible to provide such handling and as a result some ConAgra shipments are handled in local trains. Cars moving under the five-car rate from elevators served by the Buffalo Creek Railroad are delivered to Bison Yard between 4 p.m. and midnight. Once in the yard they are handled in the same manner and with the same disabilities as described above.

From Bison Yard to Hornell, where the Buffalo branch joins the main east-west line, the distance is 88.5 miles. This line comprises single-track segments totaling 48.8 miles. Occasionally delays are encountered on the single-track sections.

The cars for Martins Creek move to Portland where they are detached from the train. A local switching crew based at Bangor travels to Portland and moves the cars the 14 miles to Martins Creek. No problems are encountered in moving cars from Portland to Martins Creek. Placement of the cars for unloading on the shipper's premises is a simple and routine operation. After the cars are unloaded the local crew returns them to Portland where they are incorporated into a local or through train destined to Buffalo. On arriving at Bison Yard the cars are run over the hump and assigned to classification tracks from which they are taken to the Standard Milling elevator or tendered to Buffalo Creek for distribution by that carrier. Though not a tariff requirement, cars emptied at Martins Creek are returned to Buffalo for reloading.

The movement of grain is an important phase of respondent Erie's business. In 1972, grain and grain products accounted for revenue of about $17 million or about 7 percent of total freight revenues. Careful consideration is given any action which may affect the profit potential of this traffic. Since June 26, 1972, when the company went into reorganization, much thought has been given to developing additional revenue in ways which will entail little or no capital outlays. Respondent believes that the considered adjustment is the type that will enable it to achieve financial vigor.

Though the five-car rate is profitable, it does not offer the profit potential presented by the proposed rate. First the shipments originate at Buffalo and the movement of traffic through this terminal is expensive and time consuming. No study was made of switching operations at Buffalo and Erie's witness conceded that all terminals have some operational problems and that it is management's duty to resolve these difficulties. Nevertheless, during the 3 months of August, September, and October 1973, 113 cars of wheat moved from Buffalo to Martins Creek. A study of 110 cars disclosed that the average turnaround time was 14.7 days. The average for the month of October was 12.5 days. Very little demurrage was incurred during the study period. Other anticipated advantages under the proposal are that the train will move as a 50-car unit from Chicago to Portland and with a minimum of terminal handling from Portland to the Martins Creek destination. There will be a minimum of billing expenses, improved utilization of cars, and locomotive and crews needs can be planned with some predictability.

The limited amount of capital available to Erie makes the proposed rate specially attractive because Soo will furnish the cars. During the period from April through November 1973, there was a shortage of 3,394 covered hopper cars or an average of 424 cars a month. Most shortages occurred on the Marion, Ohio, division. There were no shortages at Buffalo during the study period. Commodity statistics show that in 1972 grains which originated on the railroad produced average revenue per car of $471. Thus respondent opines that equipment made available by the loss of the shipper's Buffalo-Martins Creek traffic could be used to relieve the covered hopper car shortage and bring additional revenue. No study has been made of the variable cost incurred in handling a car of grain as compared with the revenue realized, but respondent believes the return realized on covered hopper car traffic exceeds the return realized on other types of equipment.

Respondent calculates that 714 covered hopper cars are required to handle ConAgra's Buffalo to Martins Creek traffic. With the approval of the proposed rates these cars could be used elsewhere. On the assumption that each car would bring in revenue of $471, respondent would realize total additional revenue of $336,294. It further calculates that 85 percent of ConAgra's 2,100,000 hundredweight of spring wheat will move at the 72.25-cent rate while the balance will move at the 88-cent rate, producing total revenue of $1,018,461. Subtracting the $571,200 which could be expected from handling 68 percent of the Buffalo to Martins Creek traffic, results in incremental revenue of $447,261. Adding this to the additional revenue which can be expected from utilizing the 714 cars no longer employed in the Buffalo-Martins Creek run should produce total additional revenue of $783,555. The additional revenue is needed to continue the car rebuilding and acquisition program. The company had a deficit in net revenue during 1972. It believes its financial problems are due in part to a shortage of equipment.

ConAgra has not stated that all of its wheat requirements will be tendered to respondents, but it is Erie's belief that this will be the case inasmuch as the proposed rate meets the shipper's alternative costs. It would not be feasible for ConAgra to store wheat at Buffalo in order that traffic might be tendered to nonregulated motor carriers.

Comparison is made of the per car and per car-mile revenue realized on a 50-car, minimum 5,000-ton train, from Chicago to Buffalo as contrasted with the same train from Chicago to Martins Creek. The comparison shows that the 43-cent unit train rate for the 696 miles from Chicago to Buffalo yields $516 per car and 74 cents per car-mile, whereas, the proposed 72.25-cent rate for the 910 miles to Martins Creek yields $939 per car and $1.03 cents per car-mile. The 29-cent advantage yielded by the proposed rate represents a 39-percent improvement over the yield from the Buffalo unit train rate. If the proposed 88-cent rate in effect during the nonnavigation season is used the car-mile earnings are more than 70 percent greater than the return from the Buffalo unit train rate. In view of the higher car-mile earnings yielded by the proposed rate, respondent inquires as to who is being hurt. It concedes Erie would be better off if ConAgra used the unit train rate to Buffalo and the 5-car rate beyond to Martins Creek as opposed to the proposed rate, but ConAgra is unwilling to do this. On the assumption that Erie will receive 100 percent of the Martins Creek traffic as compared with the 68 percent which has been handled from Buffalo to Martins Creek, the proposed rate will increase the contribution to constant costs and profit by $130,054.

Soo shows the variable costs for transporting wheat in unit trains from Duluth and Minneapolis to the connection with Erie at the latter's 51st Street Yard in Chicago. The study was based on respondent's Rail Form A for 1972 adjusted to reflect wage increases as of January 1, 1974, and fuel costs up through the first week of December 1973. The witness used a fuel cost of 17.977 cents a gallon, whereas, the latest figures disclose a cost of 23 cents. In costing the unit train movement, the witness relied on operating data as developed by the witness who testified as to railroad operations. The cost study reflects train and enginemen's wages, weight of power equipment, number of cars per train, and assumes 100 percent deadheading of crews except for the second and succeeding trips on the segment between Superior and Stevens Point in the case of trains originating or terminating at Duluth, and between Chippewa Falls and Minneapolis. For purposes of fixing car ownership costs, per diem expenses were used because they reflect more accurately the actual variable ownership costs for unit train operations.

The basic assumptions on which the study was made are shown in the table on page 3 of exhibit 2. The study assumes a tare weight of 28.1 tons, a calculation made by the witness as of October 1973, when 43 percent of the covered hopper fleet comprised steel cars and the balance aluminum. On the basis of recent car acquisitions, most of which are made of steel, the cost per 100 pounds referred to above would increase by about 5 one-hundredths of a cent. In the event the unit train should comprise equal number of steel and aluminum cars, the average tare weight could be about 28.75 tons, which would cause the variable cost figures to be slightly understated. The study was based on a lading weight per car of 102 tons even though minimum weight per car is 95 tons or 190,000 pounds. An examination by respondent's operating witness of 5 or 6 Buffalo unit trains moved during the 1973-74 season disclosed that the trains comprised 49 cars and the aggregate weight was 10,045,000 pounds. This breaks down to an average of 102.4 tons per car. For this reason respondent believes it will load 5,100 tons or more in a 50-car unit train.

The study concludes that the variable cost is 19.9 cents per 100 pounds from Duluth and 19.3 cents from Minneapolis. No study was made as to the costs from Superior or St. Paul, but as these points are intermediate to Chicago, the witness opines that the costs from these points would be about the same.

Erie developed variable costs for handling wheat in a 50-car unit train movement from Chicago to Martins Creek and in the 5-car movement from Buffalo to Martins Creek. The studies were made by applying Rail Form A to the 1971 operating expenses and statistics, including a 4-percent return on investment and excluding floating expenses and return on floating equipment. System average car ownership costs were excluded, but appropriate per diem and mileage expenses for Soo equipment which would be used in the unit train movement were included. The 1971 cost levels were adjusted to reflect wage and price levels as of Janaury 1, 1974.

The original cost study circulated prior to the hearing produced variable costs per 100 pounds of 25.480 cents from Chicago to Martins Creek and 17.576 cents from Buffalo to Martins Creek and margins above variable cost of about 21.48 and 22.42 cents. On the basis of comments contained in the cost study by protestant flour mills and comments contained in a statement by Penn Central, also circulated prior to the hearing, Erie revised its cost studies to reflect the revisions in the way the unit train was expected to be handled. The revised studies are found in exhibits 10 and 11 and they show that the variable cost for the unit train movement from Chicago to Martins Creek is 26.967 cents, while the cost of the five-car run from Buffalo to Martins Creek is 17.444 cents. On the revised basis, the margins above variable cost are 19.99 and 22.56 cents, respectively. Respondent used the Rail Form A method for computing locomotive costs which, in effect, is an average cost of operating all sizes of locomotives. The unit train will be pulled by two, and for a short distance by three, 3,600-horsepower locomotives for the 835 miles from Chicago to Scranton. These are the largest, heaviest, and most powerful locomotives used by Erie and respondent acknowledges that the reliance on average locomotive costs understates to some extent the costs associated with the unit train movement.

ConAgra, Inc., of Omaha, Nebr., supports the proposal and has submitted evidence in the proceeding. They intend to use this service. A more complete description of their evidence may be found in appendix B.

The protestants include six flour mills, the Penn Central Transportation Company, the Lake Carriers' Association, the Seaway Port Authority of Duluth and International Association of Great Lakes Ports, Niagara Frontier Transportation Authority, the Buffalo Area Chamber of Commerce, and the Board of Trade of the city of Chicago. The objections raised are varied and include opposition to the named expiration date and the level of the proposed rates, and contentions that the proposed rate unduly prefers ConAgra. There is also concern that Penn Central's share of traffic may decline which will only worsen that carriers already bad situation. The Buffalo Area Chamber of Commerce believes the proposal will be detrimental to the Buffalo mills and the lake vessels and port interests. Chicago interests object to its exclusion from the proposal. Other port interests also filed evidence in opposition.

Lake carriers contend that more than the level of rate should be considéred. They believe their mode of transportation is more efficient and this should be considered. The Penn Central objects to the divisional arrangement as well as the level of the rate and the nature of the service to be performed. A more detailed discussion of each protestants' evidence, as well as the rebuttal of respondents and ConAgra, is also contained in appendix B.

### Discussion and Conclusions

This proceeding pits respondent rail carriers and the supporting shipper against six flour mills, a large rail carrier, a group of water carriers operating on the Great Lakes, port and commercial interests at Duluth and Buffalo, and the Chicago Board of Trade. At issue is a unit train rate on wheat from Twin Ports and Twin Cities to Martins Creek, Pa., which protestants collectively see as depleting the net revenue position of respondent Erie, hurting the flour mills protestants in the sale of flour in the eastern marketing area, worsening the financial plight of the eastern railroads, destructive of the inherent advantage of water transportation on the Great Lakes and of the ports and communities which are sustained by this mode of service, prejudicial to Twin Ports and preferential of Twin Cities, and violative of section 4(1) in that the proposed rates are not made applicable at the intermediate origin of Chicago. The one issue pressed by most protestants, but in particular by the flour mills who devoted more than half of their lengthy brief to the subject, is that under the proposed rates Erie will be competing against itself and, taking into account all evidence of record, respondent will be worse off financially if the proposed rates are approved than it would be without them.

From the opening of the Martins Creek mill in May 1973, ConAgra has obtained wheat from two elevators in Buffalo. During the 7-month period from May through November 1973, 68 percent or 533,801 bushels were handled by respondent Erie under a five-car rate of 40 cents from Buffalo to Martins Creek, a distance of about 340 miles. The balance of the traffic, or 248,120 bushels, moved by nonregulated motor carriers. Under the proposed rate, Erie will be moving wheat from Chicago, a distance of about 910 miles, at a charge of about 47 cents (Erie's division of the proposed rate of 72.25 cents). Protestants submit that the very statement of Erie's sacrifice is enough to suggest the unreasonableness of the proposal.

Both Erie and the protestant flour mills submitted studies of the costs incurred in handling traffic under the 40-cent rate from Buffalo to Martins Creek, as well as those incurred in moving traffic under the proposed rates from Chicago to Martins Creek. In addition, studies were made of the net revenue Erie could expect to receive from handling 68 percent of the shipper's Buffalo to Martins Creek traffic, as compared with what it could expect to gain under the proposed rates by handling various portions of the shipper's annual tonnage.

Protestants' cost study shows that the present 40-cent five-car rate from Buffalo to Martins Creek yields a revenue contribution (excess of revenue per 100 pounds over variable cost) of 23.5 cents per 100 pounds in railroad cars and 25.6 cents in shipper cars. In contrast, Erie's division of the proposed 72.25-cent rate gives a revenue contribution per 100 pounds of 19 cents in railroad cars and 17.6 cents in shipper cars. On the assumption that 85 percent of the traffic which respondents could expect to handle would move at the 72.25-cent rate and the balance at the 88-cent rate, the proposed rate would accord revenue contributions of 20.5 cents in railroad cars and 19.1 cents in shipper cars. The Buffalo to Martins Creek rate produces from 3 to 8 cents greater contribution per 100 pounds than does Erie's share of the proposed rates. The total revenue contribution to be expected from handling 68 percent of the shipper's traffic from Buffalo to Martins Creek is $335,580 in railroad cars and $365,568 in shipper cars, while Erie's division of the proposed rates would yield $292,880 in railroad cars and $272,888 in shipper cars. Protestants' study shows that the range of the reduction in revenue contribution under the proposed rates will vary from $42,700 to $114,100, depending upon whether the 68 percent of the traffic respondent can reasonably anticipate will all move at the 72.25-cent level or whether the 85-15-percent split will be the case and depending also upon whether the movement will be in railroad or shipper cars.

Protestants also developed ratios of rates to costs for both the existing Buffalo to Martins Creek rate and Erie's division of the proposed rates. Thus the 40-cent Buffalo to Martins Creek rate yields 142 percent above variable costs for movements in railroad cars and 178 percent for shipper cars. On a fully allocated basis the excess is 73 and 90 percent, respectively. In comparison, the proposed rates will yield only 68 percent above variable costs for shipments in railroad cars and 60 percent in shipper cars. On a fully allocated basis the excess in 18 and 14 percent, respectively. This shows, protestants argue, that the present 40-cent Buffalo to Martins Creek rate is substantially more compensatory than the Erie division of the proposed rate.

Protestants point out that their cost study was based on Rail Form A data on locomotive unit costs. They believe this results in an understatement of the locomotive portion of the gross ton-mile costs on the Martins Creek unit train because the Rail Form A figures are not adjusted to reflect the greater costs associated with the newer, more powerful, and more expensive 3,600-horsepower engines. Two 3,600-horsepower units would be used for 722 miles, while three such engines would be required for 113 miles. Taking into account the greater expense of the more powerful locomotives can only mean an increase in the variable and fully allocated costs associated with the proposed unit train with a concomitant reduction in the revenue contribution.

As previously noted, respondent's study discloses that the Buffalo to Martins Creek rate produces a revenue contribution of 22.56 cents, while the unit rate at the 72.25-cent level will give 19.99 cents. The Buffalo to Martins Creek 40-cent rate, assuming an annual volume of 68 percent of ConAgra's requirements would yield a revenue contribution (excess of revenue over variable costs) of $322,100. In contrast, the proposed rates, predicted on an annual volume of all the shipper's requirements and assuming 85 percent will move at the 72.25-cent rate and the balance at the higher 88-cent rate, will bring in a revenue contribution of $452,154 or an increase in the contribution to constant costs and profits of $130,054. Respondent points out that if the 28-cent cost figure developed by protestant is used, the contribution to constant costs and profit will be $108,361.

As can be seen from the above, the difference in cost and revenue contribution per 100 pounds as between the two studies is not great. The real dispute comes when the parties calculate the volume of ConAgra's traffic which can be expected to move under the proposed rates. Protestants' cost expert states that, because of the lower alternative transportation costs, respondents cannot expect to handle more than 68 percent of ConAgra's traffic.

Several representatives of the protestant flour mills tell that, on the basis of their experience in the production and sale of flour, ConAgra will have a powerful economic incentive to use unregulated motor carrier service to meet a portion of its inbound wheat requirements. Protestant Ross Industries shows that a combination of the unregulated motor carrier charge plus the 2-cent intraplant handling cost which is avoided when using truck service, results in a 9.25-cent saving during the season of open navigation and 7 cents during the season of closed navigation. Similar views are stated by protestants Pillsbury and ADM. Even with approval of the proposed rates, the alternative transportation charges via water-truck from Twin Ports or rail-truck from Twin Ports and Twin Cities will be lower than the proposed rates. Unregulated motor carriers exercise flexible pricing procedures and can be counted on to lower their price to such a level as will make the service virtually irresistible. Respondents disclaim that ConAgra is committed to exclusive use of their service. When this is considered in light of the fact that alternative transportation service is available, that ConAgra has stated that it refuses to be "locked" to any one form of service, and that it has used unregulated motor carriers to meet 32 percent of its rerquirements, protestants assert there is simply no basis for respondents' "pie in the sky" vision that they will handle 100 percent of the Martins Creek movement. ConAgra as an intervener in support of respondents could have shed light on the volume of traffic which respondents might expect to receive, but it chose to remain silent.

Protestants show that, on the basis of the 72.25-cent rate, Erie, to obtain the same net revenue under the proposal as it receives from the Buffalo to Martins Creek rate, would have to handle about 84 percent of ConAgra's total requirements or a 24-percent increase over the 1,428,000 hundredweight which it can reasonably expect to handle. On a proposed rate weighted basis of 85 percent of the traffic moving at the 72.25-cent rate and the balance at the 88-cent rate, respondents would have to handle 78 percent of ConAgra's requirements or 15 percent more than protestants believe respondents can reasonably expect to handle. They submit that improvement of Erie's net revenue position would entail handling such a high percentage of ConAgra's traffic as either is not feasible because of the availability of nonregulated motor carrier service or is violative of the national transportation policy as being an exclusive patronage agreement. Furthermore, the aforementioned revenue diminution figures are based on the assumption that respondents will handle 1,528,000 hundredweight or 68 percent of ConAgra's requirements. The reduction in revenue could be even greater if the shipper elected to use nonregulated motor service, causing the rail carrier's share to be less than 68 percent of the shipper's requirements. It is submitted that such a possibility cannot be discounted for the reasons referred to previously.

Protestants argue that the unlawfulness of the proposed rates in terms of their effect on respondent Erie cannot be overcome by benefits which might accrue to respondent Soo. For the 12 months ended September 30, 1973, the latter had net railway operating income of $19.7 million and a return on investment of 7.37 percent. It would be improper, protestants submit, to approve rates which worsen the financial plight of hapless Erie and which subsidize the prosperous Soo.

Aside from this, however, protestants submit that Soo's share of the proposed 72.25-cent rate (25.2875 cents) would produce a revenue contribution per 100 pounds over variable costs of about 5.5 cents or about 27 percent in excess of variable costs. Furthermore, protestants assert that the accuracy of Soo's costs is doubtful in several respects. First, no expense was assigned for crew holdovers at Twin Ports and Twin Cities on the second and succeeding trips. Second, costs were based on 6.4 origin switching minutes per car at Twin Ports and 8.4 minutes at Twin Cities, but testimony by the operating witness disclosed that the figures developed by him were 12 and 7.2 minutes, respectively. Third, the cost study assumes a tare weight per car of 28.1 tons, whereas, the operating witness indicated that on the assumption of an even mix of steel and aluminum cars, the tare weight would be 28.75 tons, which would result in an increase in the cost of operation. Protestant concludes that approval of the proposed rates will not benefit Soo's net revenue position.

There is said to be still another aspect to the effect of the proposed rates on depletion of respondent Erie's revenues, according to protestants. Erie, as well as Penn Central, participates in the movement of wheat to Buffalo under the unit train rate in effect to that point. During the 1972-73 season of closed navigation, this respondent moved between 10 and 15 such trains, while during the current season up to the end of January it handled 4 or 5 such movements. The record does not disclose the portion, if any, of this traffic which moved beyond Buffalo to Martins Creek, but to the extent that there were such movements they and the revenue derived therefrom will be sacrificed to the proposal under investigation.

Protestants point out that Erie is in bankruptcy before the United States District Court for the Northern District of Ohio, Eastern Division. For the 12-month period ending September 30, 1973, respondent had a loss of $8.9 million in net railway operating income and no return on investment. In view of the profitability of the existing Buffalo to Martins Creek rate and traffic, respondent should not be permitted to exercise economic "Brinkmanship" of the enormity contemplated. Because of the financial plight of respondent, protestants request that the Commission make a thorough and detailed examination of the underlying predicate for Erie's judgment that the proposed rates will have a net revenue benefit on the company.

Special thoroughness say protestants, is said to be warranted for still another reason. Other eastern railroads, including Penn Central, stand to be adversely affected by approval of the proposed rates. Penn Central, like Erie, participates in the movement of wheat to Buffalo and, like Erie, in the movement of bakery flour from Buffalo to the eastern market. The financial condition of the eastern carriers, including Erie and Penn Central, led to the recent enactment of *The Regional Rail Reorganization Act of 1973*, Public Law 93-236, 87 Stat. 985. Therefore, the considered adjustment cannot be viewed as the routine exercise by respondents of their managerial discretion.

For all of the above reasons, protestants conclude that, in view of the demonstrated dissipation of Erie's revenue under the proposed rates and respondent's dire financial condition, the proposed rates must be disapproved as being violative of sections 1(5), 1(6), 15a(2) of the act and the national transportation policy.

Protestants are aware of the general principle that the division of a through rate as between the carriers participating in the arrangement is ordinarily not a factor in determining the reasonableness of a joint rate. They submit, however, that this general rule ought not be invoked here because of the overriding public concern in preserving Erie's net revenue and in maintaining a healthy system of railroads in the eastern section of the country. They submit that section 1(5) and (6), the rule of ratemaking in section 15a(2), and the national transportation policy require, in the context of this proceeding, that consideration be given to the effect of the proposed rates on Erie's net revenue and financial condition.

Respondents do not discuss the issue of divisions in their brief, but we are of the view that, because of the way in which the issues have developed in this proceeding, full consideration must be accorded to the effect Erie's division of the proposed rate will have on the carrier's net revenue position and on its ability to continue providing service in the eastern United States.

Preliminary to consideration of this issue is the matter of whether or not the Commission, in proceedings of the nature here involved, is foreclosed from considering the impact that approval may have upon respondents' net revenue. Generally speaking, as respondents indicate in their brief, the Commission is not, as a matter of course, inclined to interfere with a proponent's managerial judgment or engage in second guessing. However, our responsibility pursuant to the national transportation policy and the rule of ratemaking under section 15a(2) requires us to appraise the evidence of record to ensure that the proposal will not detract from adequate, efficient, and economical service. In certain situations this has prompted denial of a given proposal, while in others our assessment of the record has confirmed the practical judgment made by a proponent. Compare *Tractors—T.L. & W.T.L. Territories to S.W. & W.T.L. Ter.*, 319 I.C.C. 758, 766 (1963), with *Wheat & Wheat Flour, Westbound*, 337 I.C.C. 858, 878 (1971).

In connection with our review of the record as next discussed, it should be borne in mind that persons responsible for performing transportation services, as well as the agencies which administer the various transportation statues, are seldom if ever in a position where the outcome of a particular course of action can be charted with complete assurance that the hoped-for goal will be achieved. In a sense, the success of a transportation venture is dependent on a host of business, commercial, and competitive factors whose influence cannot all be evaluated or even known at any one time. Risk, uncertainty, and some confusion attend every venture, and so it is here.

The cost studies submitted by the protestant flour mills and Erie establish that the existing Buffalo-Martins Creek rate and Erie's share of the proposed rate are both reasonably compensatory. We accept as a valid portrayal of the cost of providing the respective services the study submitted by the flour mills, and, as shown by that study as it has been presented in the preceding paragraphs, the 40-cent Buffalo-Martins Creek rate on a per 100-pound basis would appear to be substantially more profitable than is Erie's share of the proposed rate. We are also of the view that Soo's share of the proposed rate is amply compensatory. Though both the Soo and the Erie cost studies appear to understate expenses relating to switching engine-minutes at origin, layover costs, tare weight, and locomotive expenses, these understatements are not so great as to impair the essential accuracy of the studies in depicting the approximate cost of providing the proposed service.

We have considered carefully the facts and arguments presented by protestants, but we believe the weight of the evidence fully justifies a finding that the proposed rates are just and reasonable and consistent with the objectives of section 15a(2) and the national transportation policy.

First we note that both respondents and the supporting shipper believe the proposal to be sound. Respondents believe they will be able to obtain 100 percent of the Martins Creek traffic. Soo expects to realize a net revenue contribution of $113,400, and any traffic which it realizes will contribute to its net revenue position. Respondent Erie expects to see a gain of $130,000. Though ConAgra does not state the extent to which it will use the proposed rates, there are indications of record that it believes the proposed rates to be attractive. This shipper produces flour for sale in an environment where it competes with the six protestant mills. Up to the present, wheat has been purchased from two elevators at Buffalo. One of the sources of supply competes with ConAgra in the sale of bakery flour, and, though the record is not entirely clear, it appears that the other source is a producer of family flour. Though there is no evidence of record that ConAgra has been treated unfairly by the elevators in the purchase of wheat, there are compelling reasons why ConAgra would support a direct, all-weather route from the large grain terminals in Minnesota to Martins Creek. In the considered origin area there are elevators from which wheat could be purchased which do not compete in a substantial way with the shipper. Furthermore, the proposed rates are competitive with the water-rail and the all-rail routes via Buffalo. Though the proposed rates are higher than the water-motor or the rail-motor route over Buffalo, use of the latter route would require use of storage elevators at Buffalo. As pointed out by protestants, ConAgra could purchase wheat at Twin Ports, arrange its own lake vessel transportation, store the wheat at Buffalo and draw upon the supplies as they are needed. Though this is an alternative open to ConAgra, we do not believe it should be deprived of use of lawful rate and forced to exercise a course of action which it has not seen fit to pursue.

Respondent Erie stands to benefit by an overall improvement in its net revenue position, provided of course that ConAgra tenders all or most of its traffic to the all-rail route. In addition, respondent can reasonably expect other benefits. The cars which are no longer used in the movement of wheat from Buffalo to Martins Creek can be used to relieve car shortages experienced by respondent in its

Marion, Ohio, division. The evidence shows that in 1972 the average per car revenue realized from grain and grain products was $471. The sacrifice of the Buffalo-Martins Creek traffic will release about 714 covered hopper cars yearly and, on the assumption that each such car used elsewhere in the system would bring revenue of $471, respondent can reasonably expect to realize an additional sum of about $336,000. Though Erie does not show whether the average revenue figure of $471 is compensatory, we believe, on the basis of the studies presented here, that traffic handled in covered hopper cars is profitable. Several of the flour mill protestants apparently share this view.

Respondent Erie shows that the movement of traffic through its Buffalo terminal is time consuming. A study of 110 cars moved from Buffalo to Martins Creek showed that the average turnaround time was 14.7 days. Testimony elicited of ConAgra supports this finding. Though protestant Pillsbury's experience at Buffalo is favorable, it is not established which carrier it uses out of Buffalo. Protestants submit that Erie ought not to profit by its own negligence of inaction and points out that Erie and its parent railroad, Norfolk & Western, have not attempted to jointly solve the problems of the Buffalo terminal. We encourage Erie to improve the efficiency of the Buffalo terminal. We recognize that this may be an expensive undertaking. Erie may wish to consider the property of seeking financial assistance for this purpose pursuant to the provisions of the Regional Rail Reorganization Act of 1973.

One final observation is in order. We recognize the financial plight of Erie and the broad public interest in preserving a viable network of railroad service. We believe that the proposed rates are a step toward realizing Erie's goal of improving its financial standing. The proposed rates do not constitute an irrevocable commitment of Erie's resources. They carry an expiration date of September 15, 1974, and thus will afford respondents an opportunity to review the performance of the rates in terms of effect on the carrier's net revenue position.

The protestant flour mills believe that ConAgra can be expected to move about 32 percent of its wheat requirements by nonregulated motor carriage from Buffalo to Martins Creek, but they argue that if there were a commitment on ConAgra's part to tender respondents all or a substantial percentage of its requirements, such an understanding would constitute an unfair and destructive competitive practice contrary to the national transportation policy and, therefore, unjust and unreasonable under section 1 of the act, citing *Great Lakes Ship Owners Assn.* v. *Chicago & N. W. Ry.*, 337 I.C.C. 287 and 341 I.C.C. 272. Protestant Lake Carriers' join in this criticism.

The evidence establishes that ConAgra is attracted to the respondents' proposal because of the pricing feature, and it is this characteristic which respondents hope will sustain the shipper's interest. There are other rail lines which serve Twin Cities and Twin Ports while Penn Central serves the community of Martins Creek, and through reciprocal switching, the supporting shipper's mill. There are no reasons of record for believing that these carriers could not publish their own rate at a competitive level. Furthermore, there is nothing of record to indicate that lake vessel participation in the Martins Creek movement is precluded by anything except the pricing feature.

Several protestants, but particularly Penn Central and the flour mills, submit that Erie's operation of the unit train between Scranton and Martins Creek will be so beset by operational problems, inefficiency, and uncertainty as to jeopardize the feasibility of the operation. Furthermore, protestants state that the problems which respondent can expect to encounter are so staggering as to cast doubt on the reliability and probative value of the cost study which purports to show that respondent's share of the assailed rate is reasonably compensatory. At the outset we note that Erie made no study of the way the train would operate over the 14-mile track segment between Portland and Martins Creek, and we recognize that there was considerable uncertainty and confusion regarding the manner in which the train would be handled. Initially it was contemplated that all 50 cars with two 3,600-horsepower engines would move from Chicago to Martins Creek intact. After receiving the verified statements of Penn Central's Manager-Service Planning and the cost study submitted on behalf of the protestant flour millers, both circulated in advance of the hearing, respondent substantially revised its plan of operation. The evidence shows that the Martins Creek train does not conform to the classic unit trains such as are operated by Penn Central to Monroe, Mich., and Berwick, Pa. There is no requirement, however, that this particular train conform to the classical or ideal concept of what a unit train should be. Respondent's original cost study was revised at the hearing to comport with the revisions in its plan of operations, and on the adjusted basis Erie's total variable cost per 100 pounds is 26.967 cents. The cost study submitted by the protestant flour mills shows the cost to be 28 cents. Thus it is clear that the operation as presently envisioned will yield a return which more than meets the variable cost of conducting the operation. In the final analysis the question of whether a proposal conforms with the statutory standards set forth in section 1(5) is determined by the compensativeness of the rate and on this basis we conclude that the rates conform to the statutory standard.

As outlined elsewhere in the report the train will be handled from Erie's Chicago yard to Scranton, a distance of about 836 miles, in a manner which substantially conforms to protestants' definition of what a unit train should be. At Scranton the two 3,600-horsepower locomotives will be removed and replaced by three 2,500-horsepower units. The train will continue another 61 miles to Portland where it will be separated into two 25-car cuts for the remaining 14-mile movement to the mill. We have already described in detail the manner in which respondent intends to handle the two cuts of 25 cars. As noted, this portion of the journey will require the service of a local crew headquartered at Bangor, about midway between Portland and Martins Creek, and a crew brought in from the yard at Croxton, N.J., about 81 miles from Bangor. This crew will enter on duty status at the time it enters the yard though it does not commence its work assignment until it reaches Bangor, 81 miles away. Once the cars arrive at Erie's Martins Creek yard there is a certain amount of work which must be accomplished in the yard preparatory to entering ConAgra's premises. Once in the yard the cars must be separated and switched before placement can be considered complete. The reverse of this operation must be performed when returning the empty cars to Portland for the trip to Chicago. It is clear that the manner in which the train will be handled between Portland and Martins Creek is more costly, less efficient, and cumbersome than would be the case if the entire 50-car train were moved intact to ConAgra's premises. Nevertheless, we believe the contemplated plan of operation to be feasible. The problems foreseen by the protestants in placing the cars for unloading and the possibility that the loaded or empty cars will block either or both of the plant entrances are not so substantial as to justify disapproval of the proposal. Unit trains do not move on the spur of the moment. Actual movement is preceded by consultation between the shipper and the carriers and many of the problems foreseen by protestants will be anticipated by the parties to the transportation. Respondent Erie's Portland-Bangor branch and the shipper's personnel will be expecting the arrival of the trains and can be counted upon to make every effort to work out their mutual problems. Many of the difficulties regarding placement of the cars, the unloading, and the blocking of the plant entrances are the responsibility of ConAgra and the latter sees no insurmountable barrier in receiving the unit trains. Only about 21 trains will be received each year and as their arrival can be planned, the disruption of the operation of the mill can be kept to the minimum.

Other questions raised by Penn Central as to the ruling grade traversed by the train beyond Scranton, and track curvature and highway grade level crossings on the stretch of track between Portland and Martins Creek are not specifically answered by Erie, but we have respondent's assurance that the operation is feasible. Clearly, Erie will be operating a unit train under somewhat less than ideal conditions. But we are convinced that the benefits of modern freight handling concepts ought not be confined only to those who can obtain the maximum advantage of improved technology. There is room for the less advantaged, consistent of course with conformity to the governing statutory standards. The feasibility of Soo's handling of its portion of the contemplated unit train movement is not assailed, undoubtedly because respondent's handling of the train will be identical to the manner in which the Buffalo unit train is presently being handled.

Protestants Penn Central and the flour mills deplore the adverse effect the proposed rates will have on the operations of the eastern railroads and those mills which depend upon Penn Central and other eastern railroads for the movement of wheat and flour. Penn Central is in reorganization under section 77 of the Bankruptcy Act and the Commission is obligated under the national transportation policy to administer the substantive provisions of the act so as to promote the objectives of that policy including the fostering of sound economic conditions in the transportation industry. The plight of the eastern railroads have been recognized in numerous decisions by this agency and by the recently enacted *Regional Rail Reorganization Act of 1973.*

Penn Central, like Erie, serves Chicago as well as Buffalo. From the former it moves grain to the East and participates in the Buffalo unit train movement. It is quite probable that some of the grain which it has handled to Buffalo eventually moved to Martins Creek. With approval of the proposed rates this traffic will be lost to protestant. Flour is handled from Buffalo and Chicago to the same eastern market which ConAgra solicits. Protestants emphasize that the proposed rates will not generate new business, but will merely cause a change in old traffic patterns resulting in Erie's eastern rivals adopting rate-cutting measures to protect their traffic.

The Commission has disapproved rates where it was shown that their approval would lead to ruinous competition and disastrous effects on commerce. However, we are not presented with that sort of situation here. The record does not disclose the volume of wheat and flour traffic handled by Penn Central from Chicago and Buffalo and in the absence of such a showing the effect of the proposed rates on protestant cannot be determined with any degree of precision. There is evidence that protestants' covered hopper car business out of Buffalo is sorely taxed with the result that shippers requiring this type of equipment are subject to long waiting periods before they can expect to be furnished equipment. In a transportion milieu where competition is the norm the Commission must exercise its responsibilities so as to promote a general climate where carriers are afforded the maximum opportunity to achieve financial vigor without also endangering the public's need for efficient and economical transportation services. The financial problems of a carrier may not be used as a shield to protect it from competition. Respondent Erie is in much the same position as Penn Central and we do not believe that there is sufficient evidence of record to warrant a conclusion that the proposed rates would have a ruinous effect on rival carriers and, therefore, would be unlawful.

During the course of the hearing much was made by Penn Central of the unfairness of the arrangement whereby respondent Soo receives 35 percent (25.28 cents) of the proposed 72.25-cent rate while respondent Erie receives 65 percent (46.97 cents) as its share. The divisional split of the Buffalo unit train rate is 40 percent or 17.2 cents to Soo and 60 percent of 25.8 cents to Erie. Soo's train operation obligations are the same under both rates, but it will receive additional revenue of about 8.08 cents or about 50 percent more for performing the same service as it provides when the unit train moves to Buffalo.

The record is clear, however, that the divisional arrangement accords full consideration to the interests of both carriers. Though as noted above Erie will experience operational problems in handling the unit train between Portland and Martins Creek, Soo will be charged with the duty of assembling the 50 empty cars which are to comprise the train. At Twin Ports it must move the empty cars from Stinson Yard to Rice's Point Yard, a distance of 7 miles, and return with the loaded cars. On traffic originating at Twin Cities, 50 empty cars must be assembled though the switching operation will be simpler. Soo's cost study shows that the revenue contribution per 100 pounds is about 5.4 cents on movements from Twin Ports and almost 6 cents from Twin Cities, while Erie realizes almost 20 cents on the basis of its study or almost 19 cents as found by protestant flour mills. Comparison of the divisional agreement applicable in connection with the proposed rate with those currently in effect on multicar or unit train movements of wheat from Twin Cities and Twin Ports to various eastern and southern ports for export, for greater distances than those involved here, shows that the considered agreement is more favorable to Erie.

Protestant flour mills submit that the evidence shows that respondent Soo is committed to supply covered hopper grain cars in sufficient numbers to meet ConAgra's requirements, but has no similar commitment to supply cars to the protestant mills in connection with their movements to Buffalo. Thus respondents are said to extend an unlawful preference to ConAgra which will work to the advantage of that shipper and to the disadvantage of the Buffalo mills. A related issue is raised by Penn Central which claims that Soo's commitment to ConAgra will reduce the cars which it will be able to furnish for the Buffalo unit train movement with the result that protestant will have to supply more cars for this movement or suffer a loss of business.

Respondents and protestants agree that covered hopper cars for the movement of grain are in short supply. The Commission is aware of the problem and from time to time issues car service orders designed to promote the equitable distribution of freight cars. Soo has a fleet of 2,054 covered hopper cars and the governing car service order allows it to dedicate 277 such cars or about 13 percent of its fleet to unit train operations.

Though at one point in the record Soo did state that it had a commitment to ConAgra in the matter of car supply and though protestant Pillsbury stated that a railroad representative declined to provide equipment because of a commitment to ConAgra, there is other evidence by Soo that its understanding wth ConAgra is the same as the arrangement it has with shippers who use the Buffalo unit train rate. Protestants Peavey, Standard Milling, and Pillsbury testified to the inability of Soo to provide equipment at the times requested. However, respondent has initiated at least one unit train movement for each protestant and more are contemplated as the season advances. During the 1974 season of closed navigation Soo and its Chicago connections plan to dedicate five unit trains to move grain to Buffalo. These trains are expected to make about 60 trips. The record indicates that an additional 60 or so trains are planned by other origin lines which participate in the Buffalo unit train movement. Thus, though the Buffalo unit train tariff does not require that the shipper tender three consecutive trainload movements, the effect of which would be to tie up the equipment for the period of time required to complete the movement, the same dedication of equipment is the practice on the Buffalo movement. Of course the Buffalo unit train rate is used by several shippers with mills at Buffalo, whereas, the Martins Creek rate will be used only by ConAgra. This, however, is not a preference by design but by accident.

There is another matter to be considered. The demand for rail wheat at Buffalo is substantially greater this year than in all the previous years that the rate has been in effect. The reason for this shift in transportation patterns is due to the high cost of owning wheat as explained in more detail elsewhere in the report. Thus the present tight supply of cars may not characterize the grain trade in the 1975 season of closed navigation.

Respondents, intervener supporting respondents, and protestants agree that about 18 of the contemplated trains to Martins Creek will move during the season of open navigation, while the balance or about 3 trains will move during the season of closed navigation. In contrast, all the Buffalo unit train movements since the time the rate was first established, with but one possible exception, have moved during the season of closed navigation. Thus in effect the two unit train movements should complement each other and together bring about a desirable year-round employment of a valuable resource.

The proposed tariff provides for the payment of allowances in the event ConAgra should elect to furnish its own cars for the movement of wheat to Martins Creek. ConAgra has a fleet of 150 covered hopper cars and in the near future expects to take delivery on 100 additional units. In the event the supply of Soo cars should become tight the shipper is willing to supply cars out of its fleet. There is no similar provision in the Buffalo unit train tariff, but respondents indicate a willingness to modify the tariff in this respect should there be a request or should the Commission find that an authorization for allowances in this tariff but not in the Buffalo unit train tariff constitutes a violation of section 3. None of the protestant mills has been interested in furnishing its own equipment though several operate private fleets. At this time the dissimilarity is academic and, considering that respondents are willing to authorize payment of allowances, we see no reason to disapprove the rates for this reason.

Finally, we note that respondents and ConAgra disavow any intention to practice the type of preference-prejudice proscribed by section 3 of the act. Should the carriers fail to abide by the policy stated in this section, the aggrieved parties have other sources of relief.

Protestant Board of Trade of the city of Chicago submits that it would be to respondent's economic advantage to retain its covered hopper car fleet in the area which it serves. Lake Carriers' asserts that if respondents and the Commission are really concerned about car supply shortages they should allow grain to move by lake vessel from Twin Ports to Buffalo thereby freeing covered hopper cars for other service.

Though Soo did state that it would be to its advantage to keep its cars on line, it also indicated that it was seeking to grow and improve its net revenue position, and on balance it sees the current proposal as a way to achieve growth. As a matter of broad public interest it ought to be remembered that an efficient nationwide network of rail service requires that railcars furnished by the origin line frequently must move off line. Transportation companies must meet the needs of commerce and these needs frequently extend beyond the lines of any single carrier. It should be noted that the Martins Creek plant is operational and is dependent on rail delivered wheat. There are reasonable grounds for believing that the employment of a unit train to furnish the wheat is overall more efficient in terms of car use than is the Buffalo-Martins Creek movement under the five-car rate.

Protestant flour mills aver that the proposed 72.25-cent rate is unjust and unreasonable in that it includes a factor for lake vessel service which is unrealistically low. Except for the order of suspension, the 72.25-cent rate would have applied during the open season of navigation from April 1 through September 15, 1974, yet the water factor used by respondents in computing the level of the rate was based on water charges prevailing during the 1973 season of open navigation. Respondents should have exercised an informed judgment as to the level of the lake vessel charge during the 1974 vessel season. Their failure to do this results in an "understatement" of the suspended rate for application during the navigation season.

Protestants show that lake vessel charges have increased almost 45 percent or about 7.5 percent a year over the 6-year period from

1966 through 1971. The Commission is asked to take such fact into consideration, as well as the continuing inflationary trend of the economy. Protestant Peavey shows that application of the 7.5-percent increase figure to ConAgra's statement of the average 1973 vessel charge of 25.83 cents produces a vessel cost of 27.77 cents. It concludes that the proposed rate has been understated by at least 2 cents. Protestant Pillsbury testified that the 1974 lake vessel charges will be at least 29 to 30 cents. The understatement in the water vessel factor is important in that as little as a 1 cent a 100 pounds is important in determining the mode of service used by the miller in moving wheat by the bakery in choosing a supplier.

Protestant flour mills argue that the proper anniversary date for the proposed rate which is to apply during the open season of navigation is the end of February or about 30 days prior to the opening of the navigation season. Such a date will give respondents a better idea of what the lake vessel charges will be for the coming season. Accordingly, the September 15 expiration date is said to be an unreasonable practice in violation of section 1(6) of the act. They submit that the Buffalo unit train rate cannot be used to justify the proposed rate, pointing out that the Buffalo unit train rate is not competitive with lake vessel service during the season of open navigation. The Buffalo millers do not have a unit train rate offering a service competitive with the lake vessel service during the season of navigation. Yet ConAgra, while purporting to seek only what the Buffalo millers have, is actually asking for unit train service to compete with the lake vessel movement during the navigation season.

We see nothing improper in the proposed rate either by reason of the September 15 anniversary date or because the 1973 lake vessel charge was used as the water factor in constructing ConAgra's alternative transportation charges. First, the proposed 88-cent rate is to have application during the season of closed navigation and in arriving at what the rate level should be respondents took into account ConAgra's alternative transportation charges, one factor of which is the Buffalo unit train rate. As the latter rate has an effective date of September 15, there is a certain logic in having the same effective date apply in connection with the Martins Creek tariff. It is true, as protestants point out, that establishing a rate effective September 15, which is to have application during the open season of navigation beginning April 1 of the following year, may understate the vessel charge which is to apply for the coming year. There are two answers to this. First, respondents intend to meet the alternative transportation costs available to ConAgra: that is, the lake vessel charge, the elevator charge at Buffalo, and the rail rate beyond to Martins Creek, and the proposed rate will be increased to the level of the alternative costs. Secondly, and as discussed in more detail later, the rule of ratemaking in section 15a(3) requires that the rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode, giving due consideration to the objectives of the national transportation policy. To find the proposed rate unlawful because of failure to include the precise level of the water factor would be contrary to the guidelines set forth in the aforesaid section. Finally, the same anniversary date for both the Buffalo and the Martins Creek tariffs should make it easier to avoid future controversies between respondents, the Buffalo millers, and ConAgra as to proper rate levels for their respective movements.

The proposed rates are said to be unjust and unreasonable in violation of section 1(5) of the act and the national transportation policy in that they will put the protestant flour mills at a substantial competitive disadvantage in competing with ConAgra in the eastern market for flour to bakeries which prefer delivery by truck.

Protestants show that large and growing numbers of bakeries insist upon truck delivery, including those which are on rail and equipped to receive bulk flour by this mode. International Multifoods compiled a list of 158 bakeries in the eastern market of which about 56 are on rail. Of the total number 86 receive bulk flour, of which a little more than half are on rail. There are a number of reasons for this preference which we have alluded to previously and there would be no point in discussing the matter again.

It is ConAgra's policy to open flour mills in close proximity to the areas where flour is sold in recognition of the fact that it is cheaper to move wheat in large volumes for long distances than flour. The record shows that ConAgra is not alone in recognizing the advantages of this practice. The Martins Creek mill is less than 100 miles from major consuming centers in New York, New Jersey, and eastern Pennsylvania. In excess of 80 percent of production will be delivered by the shipper using its fleet of bulk flour trailers. ConAgra intends to solicit all users of bakery flour whether located on rail or off rail, but in general it believes its prime appeal will be to those bakeries which are not located on a rail siding.

ConAgra, apparently in an effort to demonstrate that the proposal will not adversely affect the competitive position of the Buffalo mills, shows that the combination of the proposed rate of 72.25 cents, the 2-cent intraplant transfer expense, and the cost of motor delivery to the important markets of Philadelphia, Hackensack, Brooklyn, and Jamaica results in total costs of $1.0325, $1.0425, $1.0725, and $1.0825, respectively. It compares these costs with those experienced by the Buffalo mills using lake vessel service to move wheat from Twin Ports to Buffalo and a 58-cent rail rate on flour from Buffalo to the East, resulting in total laid down costs to all four points of 88 cents.

Protestants submit that the above comparison fails to reflect ConAgra's advantage in two respects. First, the lake vessel factor was based on 1973 lake vessel charges and without question these charges will be greater in 1974. Second, no consideration was given to protestants' costs in selling flour in the eastern market to customers who require or prefer delivery by motor vehicle. Thus, protestant Peavey shows that the expense of moving flour from Rollins terminal at Norristown, Pa., by motor carrier to accounts in Philadelphia is 26.50 cents. From Brooklyn Eastern District Terminal to accounts in Brooklyn and Jamaica the cost is 12 cents, while to those in Hackensack it is 18 cents. Other protestants show similar or higher expenses for truck delivery. Protestant shows that on a total cost basis, that is on the wheat from Twin Ports to Buffalo and flour beyond, ConAgra's advantage is 25.34 cents at Philadelphia, 2.84 cents at Brooklyn, 1.84 cents at Jamaica, and 11.84 cents at Hackensack.

Protestants ADM and Ross Industries produce flour in the Midwest and rely upon rail carriers to move their product to the eastern market where it is sold in competition with that which is produced by ConAgra and the Buffalo mills. ADM from its mills in Minnesota and Iowa pays a rate of $1.18 to Philadelphia. The expense of transferring the flour to truck and the cost of delivery by the latter mode to accounts in Philadelphia is 25 cents producing a total expense of $1.43 as compared with ConAgra's cost of $1.0325.

Ross Industries fears that approval of the proposed 72.25-cent rate will enable ConAgra to ship hard winter wheat from Omaha at a total cost of $1.0825 (36 cents Omaha to Twin Cities and 72.25 cents Twin Cities to Martins Creek). The present charge on this variety of wheat is a combination rate over Chicago of $1.25. The reasons why ConAgra would perhaps be interested in buying hard winter wheat have been referred to elsewhere, but protestant submits that the 17-cent advantage offered by the proposed rate would provide ConAgra with an additional advantage.

Though protestant flour mills show that a great many bakeries are located off rail and though the advantages of motor carrier delivery are many, with the exception of Standard Milling, they do not disclose the volume of their flour sales which move through the several rail terminals for transfer to motor vehicles. Standard disclosed that, in 1973, 3,148,137 hundredweight or 3,159 cars moved to the Brooklyn Eastern District Terminal, but the record does not show how much of this traffic comes from Buffalo.

There are a number of indications of record that items of expense other than identifiable transportation costs will determine a mill's success in selling flour in the eastern market. Thus, ConAgra has moved four trailer loads to a bakery in Waterbury, Conn., but future shipments to this account will move by rail from the company's mills in Nebraska. Protestant ADM is shown to incur a cost of $1.43 on motor delivered flour in Philadelphia, whereas, the Buffalo mills can reach the same account at a cost of $1.31, yet despite a 12-cent handicap, protestant apparently has been able to retain its share of the market. There appears to be a good deal more fluidity in the eastern market than protestants indicate. The Martins Creek mill had been in operation about 8 months at the time of the hearing, but the evidence of any substantial switch in sales from protestants to ConAgra was lacking. Protestants Peavey and Standard do not refer to any accounts which have been lost to ConAgra. Pillsbury lost business in Waterbury to ConAgra's Nebraska mills, ADM lost an account in Philadelphia to ConAgra, who in turn lost it to another miller, while Ross lost an account at Easton to ConAgra who in turn lost it to some other miller. International Multifoods appears to be the biggest loser with a total of five accounts. The evidence indicates that bakers exercise a considerable degree of mobility in the purchase of flour, many floating from one producer to another.

There is another matter to be considered. The record shows that the Buffalo mills enjoy an advantage over ConAgra on movements to accounts which will accept rail delivered flour. On the basis of protestant Peavey's comparison, the advantage of the Buffalo mills ranges from about 5 cents at Philadelphia to 10 cents at Jamaica.

The marketing of flur is a competitive business with sales turning on as little as a cent or less difference per 100 pounds. The positioning of flour mills close to the markets they will serve is a policy of ConAgra, as well as the mills with which it competes. It is not the purpose of the act to equalize every producer's position in a given market. See *Wheat & Wheat Flour, Westbound,* 337 I.C.C. at 879-880.

Protestants Lake Carriers' Association, International Association of Great Lakes Ports, and Seaway Port Authority of Duluth argue that the proposed rates are an unfair and destructive competitive practice of the type forbidden by the national transportation policy in that they fail to recognize the inherent cost and service advantages of commerce on the Great Lakes. The basis for this complaint is that respondent Erie does not hold out rates or unit train service on wheat interchanged at Buffalo with lake carriers at levels comparable, distance considered, to the proposed rates. Similarly, Erie does not offer to publish rates or unit train service on flour milled at Buffalo and shipped to the New York City and Philadelphia areas at levels comparable to the proposed basis. It is alleged that Erie's action is also violative of sections 1(5), 2, and 3(4) of the act. Protestants refer to numerous cases where the Courts and Commission have disapproved rail rates which discriminated against water transportation including *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, *Chicago, Rock Island & Pacific R. Co.* v. *United States*, 233 F. Supp. 381, and *James McWilliams Blue Line, Inc.* v. *United States*, 100 F. Supp. 56.

Protestant Lake Carriers' points out that the present lake vessel rate from Twin Ports to Buffalo including the cost of transferral is about 35 cents. The rate on flour from Buffalo to New York and Philadelphia is 58 cents, producing a through water-rail charge of 93 cents. To meet the competition posed by the proposed 72.25-cent rate, protestant's members would have to reduce the water carrier cost from 35 cents to 14.25 cents or about 59 percent. The rail distance from Twin Ports to Martins Creek is about 1,379 miles, while the distance from Buffalo to Martins Creek is about 340 miles. Thus respondents are transporting wheat an additional 1,039 miles for only 14.25 cents more than they obtain for handling flour from Buffalo to the eastern market. Stated otherwise, Erie transports flour 340 miles at a charge which is about 80 percent of the proposed 72.25-cent rate which applies for a distance of about 1,039 miles. The existing single-car rate on wheat from Twin Ports to Martins Creek is $1.05 or 32.75 cents higher than the proposed 72.25-cent rate. The protestant concludes that a reduction of this magnitude can only be classed as predatory. The inability of the lake carriers to compete with the proposed rate is not due to the inherent efficiency of the all-rail route, but rather to Erie's discriminatory failure to provide unit train rates and service, distance considered, from Buffalo to Martins Creek, New York City and Philadelphia. Erie is said to be using its monopoly control of the area east of Buffalo to force grain traffic off the Great Lakes and onto the all-rail route through the device of keeping the ex-lake rates out of Buffalo at such a high level as to preclude use of the lake-rail route.

Resolution of these issues impels consideration of the rule of ratemaking set forth in section 15a of the act. Section 15a(2) requires that the Commission, in exercising its ratemaking powers, give consideration, among other factors, to the effect of the rate on the movement of traffic by the carrier for which the rates are published, and to the public's need for adequate and efficient rail service. Section 15a(3) provides that in a proceeding involving competition between carriers of different modes the Commission shall consider the effect of the rate on the proponent and that the rate of the proponent shall not be held to a particular level to protect the traffic of another mode of transportation, giving due consideration to the objectives of the national transportation policy. The clear import of the above language is that in a carrier competitive rate adjustment the Commission's concern must be directed primarily to the effect of the rate on the proponent, and that the rate must square with the broad objectives of the national transportation policy. Protestant places particular emphasis on those portions of the above statement which require in effect that the act be administered so as to recognize and preserve the inherent advantages of each mode of service and to encourage establishment of reasonable charges without unfair or destructive competitive practices.

The issue then is whether the proposed rates deprive protestant's members of their inherent advantage. The record does not disclose protestant's cost of providing service from Twin Ports to Buffalo, but in its brief reference is made to the common knowledge that lake vessel rates are depressed because of foreign competition, and, therefore, it is logical to assume that the cost of performing service is but little below the prevailing vessel rates. As protestant's members are shown to be transporting wheat at 16 cents a bushel for the 992 miles from Twin Ports to Buffalo they are said to have the inherent advantage. However, in an intermodal rate proceeding the Commission may not substitute assumption for hard evidence. Protestant presented little evidence as to the character of the operations conducted by its members. Its failure in this regard, when considered in light of the other facts of record, leads us to conclude that the proposal does not take away the inherent advantage of water carriage.

Furthermore, there is no warrant for concluding that the rate is a destructive competitive practice. First, lake vessels presently handle about 87 percent of the wheat traffic which moves from Twin Ports to Buffalo. There is no real danger that the proposed rates will cause them to lose their predominant position in meeting the wheat requirements of the Buffalo mills. Even with approval of the proposed rates protestant carriers can expect to continue handling about 80 percent of the wheat which could be considered as moving to or via Buffalo.

There is another matter which must be evaluated. The national transportation policy contains a number of guidelines which the Commission is obligated to take into account in administering the act. Protestant has referred of course to the clauses requiring that inherent advantages be preserved and destructive competitive practices outlawed, but of equal standing is the requirement that the act be administered in a way so as to promote efficient service and foster sound economic conditions in transportation. The record establishes that respondent Erie is in poor financial condition and the proposed rates are looked upon as a step toward financial vigor. Though certain protestants believe that the proposed rates will work to Erie's financial disadvantage, we have weighed the evidence and conclude that Erie's expectations are justified. There is also the question of the efficiency of Erie's operations at Buffalo. Both Erie and ConAgra state that the movement of traffic out of Buffalo is an expensive, time-consuming operation. Protestant Pillsbury shows that in terms of transit time, shipments from Buffalo are more likely to arrive at destination on schedule than those dispatched from 11 other company terminals. Aside from the fact that protestant measures transit time without disclosing the norm of service or its expectations, we are constrained to accept respondent's study which shows that during the 3-month period of August, September, and October 1973, the average turnaround time Buffalo to Martins Creek to Buffalo was 14.7 days. This is substantially longer than the contemplated round trip time between Twin Ports and Martins Creek. In short the record in this proceeding as applied to the national transportation policy does not justify the conclusion that the proposed rates are contrary to that policy. This brings us back to the substantive rule of ratemaking set forth in section 15a and in light of the clear unqualified language of that section to the effect that in exercising its ratemaking functions the Commission shall consider the rate in terms of its effect on the proponet carrier, we have no hesitancy in concluding that the rates are shown to be just and reasonable.

Section 3(4) provides in effect that rail carriers shall not discriminate in their rates between any connecting line or unduly prejudice any connecting line in the distribution of traffic that is not routed by the shipper. Insofar as is pertinent to the issues in this proceeding, a connecting line is defined as a common carrier by water subject to part III of the act. So far as the record shows, protestant's members are not regulated carriers and, therefore, not entitled to protection under section 3(4). Aside from this, however, it is clear that there is no merit in protestant's argument. Section 3(4) is designed to discourage unequal treatment of connecting carriers at a given point. The proposed all-rail route passes well south of Buffao and Erie does not extend unequal treatment at Buffalo as between carriers.

Section 2 makes it unlawful for a carrier to charge or extend to any person a greater or lesser compensation for any service rendered than it charges or extends to any other person for doing him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The provisions of this section are clearly intended for the protection of similarly situated shippers or receivers of traffic. Even if this were not true, Erie's allegedly discriminatory treatment of protestant Lake Carriers' or the flour millers located at Buffalo is not coupled with a corresponding favored treatment of other interests.

Finally, protestant Lake Carriers' contends that the Commission must evaluate whether the lake vessels or the railroads are the most efficient in terms of fuel consumption. Great Lakes bulk cargo vessels using oil-fired engines transport 495 ton-miles of cargo on a gallon of fuel. More importantly, most of the lake vessels handling grain use coal as a fuel. The efficiency of lake vessel service in terms of fuel consumption is established, but so is that of unit train movements. The relative merits of lake vessel service compared rail service in terms of energy consumption are factors to be considered in the disposition of this proceeding, but in the context of the manner in which this proceeding has developed, they must be considered along with numerous other criteria in determining the proper disposition of this proceeding. We conclude that fuel conservation advantages as between the competing modes of service was not developed to the point where is it dispositive of the proceeding.

Protestant Board of Trade of the city of Chicago submits that the failure to apply the proposed rates at Chicago violates sections 3(1)

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and 4(1) of the act. Chicago is directly intermediate over respondents' route of movement from Twin Cities or Twin Ports to Martins Creek. It is a major grain terminal with extensive grain storage capacity and is capable of loading and handling unit trains of 50 or more covered hopper cars. No unit train rate is published from Chicago to Martins Creek with the result that grain originating there is subject to a flat rate of 98 cents or a proportional rate of 81 cents. Thus the Chicago proportional rate is 8.75 cents higher than the proposed 72.25-cent rate during the season of open navigation. It suffers under an even greater disadvantage if the flat rate is used for comparison purposes. Section 4(1) provides:

> It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, ***.

Protestant recognizes that the Commission has found that there is no fourth section violation in situations where the unit train rate from the more distant point is compared with a single-car rate from an intermediate origin on the ground that the transportation service from the named origin was unlike that being offered from the intermediate point. Protestant submits that this view of the fourth section is outmoded. Today the covered hopper car is the customary vehicle used in the movement of grain and the use of these cars in unit train movements is increasing and will continue to do so. Accordingly, the guidelines used in determining fourth section violations where single-car rates apply from both the named and the intermediate origins should be applied in situations such as here where a unit train rate is published from a named origin. Protestant notes that the Commission has instituted a rulemaking proceeding, Ex Parte No. 304, *Amendment of Rule 27 of Tariff Circular No. 20—Intermediate Application of Rates,* looking toward the possibility or requiring carriers publishing unit train or multicar rates to make such rates applicable at intermediate origins.

With respect to the section 3 issue, protestant contends that the proposed rates extend an unfair preference to elevators at Twin Ports and Twin Cities while at the same time the failure of respondents to extend these same rates to elevators at Chicago constitutes undue prejudice. Reference is made to *Chicago Board of Trade* v. *Illinois Central R. Co.*, 344 I.C.C. 818, 830, where the Commission said:

> To support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the defendant carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. Compare *Big River Industries, Inc.* v. *Aberdeen & R. R. Co.*, 329 I.C.C. 539. The complainant has the burden of proving the presence of the first three factors, and the defendants have the burden of justifying the disparity under "(4)."

Though the issues raised by protestant relate to two different sections of the act, discrimination is common to both and they will be discussed jointly. The record discloses that there is a disparity of rates and that respondent Erie is the source of the alleged preference and prejudice. We are not persuaded, however, that protestant or any of its members have been competitively harmed. We accept the claim that Chicago is a large grain market with extensive storage facilities and that 4 elevators in the area are capable of loading unit trains of 50 or more cars. But the record discloses that the Martins Creek mill will purchase wheat only at Twin Cities or Twin Ports. There is absolutely no evidence that ConAgra is interested in buying wheat at Chicago or that the Chicago elevators are interested in negotiating a sale of grain to ConAgra.

Accordingly, we conclude that the proposed rates are not in violation of either sections 3(1) or 4(1) of the act insofar as these issues are raised by this protestant. We note that the fourth section issue will be resolved in Ex Parte No. 304. The latter is a general rulemaking proceeding where full consideration can be accorded the questions of policy raised by protestant.

Protestant also contends that the proposed tariff schedule violates section 6 in that, while provision is made for application of the proposed rates at destinations intermediate to Martins Creek, there is no similar treatment for intermediate origins. Criticism is also directed to the proportional character of the proposed rates on the ground that this limits the use of the rate and it would have been better had the rate been published as a flat rate. Protestant does not explain how or why the matters which it has raised violate section 6. In general, however, that section merely requires that tariffs be set forth in such a way that the rate level and the terms governing use of the rate can be applied with the greatest possible degree of certainty. We conclude that the proposed schedule meets the requirements of section 6.

Protestants Seaway Port Authority of Duluth and International Association of Great Lakes Ports and the protestant flour mills allege that application of the 72.25-cent rate from Twin Cities and Minnesota Transfer as well as from Twin Ports is preferential to the former and prejudicial to the latter, is unjust and unreasonable and constitutes a destructive competitive practice. Protestants submit that the 72.25-cent rate is designed to meet the alternative transportation cost available to ConAgra of moving wheat from Twin Ports to Buffalo, the elevator cost at Buffalo, and the rail rate beyond to Martins Creek, but they point out that there can be no similar justification for applying the same rate from Twin Cities and Minnesota Transfer about 160 miles inland from Twin Ports. The true alternative cost from Twin Cities would include a factor of 15 cents which is the charge for moving wheat from Twin Cities to Twin Ports. Respondents in reply show that grain rates from most country origins are the same to both Twin Cities and Twin Ports and that the same rates apply from both terminals to both the gulf and Atlantic ports for export, as well as to points in official territory.

We agree with protestants. Both Twin Cities and Twin Ports are large grain terminal centers and we may properly assume that they are in competition for the outbound movement of wheat. Twin Ports by reason of its location has a transportation advantage in relation to Twin Cities which the proposed 72.25-cent rate ignores. Respondent Soo serves both Twin Cities and Twin Ports and does not show why a water-related rate from Twin Ports should be applied to origins 160 miles inland. We are not persuaded that past practices equating the rates to and from the two markets nor the future possibility of fourth section violations in the event other carriers join the adjustment constitute sufficient reason for similarity of treatment in this proceeding. A lawful rate from the preferred origins would be 88 cents which is substantially the product of the local 15-cent rate from Twin Cities to Twin Ports and the proposed 72.25-cent rate beyond.

Upon consideration of all evidence of record, we conclude that the proposed 72.25-cent rate from Minneapolis, St. Paul, and Minnesota Transfer, Minn., to Martins Creek, Pa., is unlawful to the extent that the rate from those points is less than 88 cents. We further conclude that the proposed 72.25-cent rate from Duluth-Superior (Twin Ports) during the season of open navigation on the Great Lakes and the proposed 88-cent rate from all tariff origins during the season of closed navigation are shown to be just and reasonable and otherwise lawful.

Respondents submit that the proposed schedule if approved will not result in a significant effect on the quality of the human environment. Protestants do not dispute respondents assertion except insofar as their comments concerning covered hopper car shortages and the fuel saving characteristics of lake vessel service may be said to have a bearing on the environment. We have stated that these criticisms of the proposal when considered in the context of all relevant factors do not indicate that the proposal is at odds with the purposes sought to be achieved by the National Environmental Policy Act of 1969. Mention has already been made of the delays Erie shipments encounter at Buffalo and to the fact that 32 percent of ConAgra's requirements have moved by exempt motor carriage from Buffalo. We, therefore, believe the substitution of these services by the unit train will benefit the environment.

## FINDINGS

We find that the proposed schedule is unlawful without prejudice to the republication of said schedule to reflect rates consistent with the above-stated conclusions. An order will be entered requiring cancellation of the proposed schedule and discontinuing the proceeding. We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER HARDIN, dissenting in part:

I disagree with the majority's holding that the maintenance of identical rates from the Twin Ports and Twin Cities to Martins Creek during the open navigation season is unduly preferential to inland points and unduly prejudicial to Twin Ports, or is otherwise unlawful.

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*It is ordered*, That respondents be, and they are hereby notified and required to cancel the schedule described in the order of October 31, 1973, by the Commission, Division 2, Acting as an Appellate Division, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, without prejudice to the filing of a new schedule in conformity with the above-stated conclusions.

*And it is further ordered*, That the proceeding be, and it is hereby, discontinued.

By the Commission, division 2.

ROBERT L. OSWALD,

(SEAL) *Secretary.*

## APPENDIX A

At Twin Ports cars for the first movement will be gathered from normal grain releases of cars emptied in the area. The cars will be assembled at the Stinson Avenue Yard in Superior. When sufficient cars have been gathered they will move as a unit to the Rice's Point Yard in Duluth, a trip of about 7 miles. Normally a yard transfer crew which comes on duty at Rice's Point Yard at 11:30 p.m. will handle regular transfer business from Rice's Point to Stinson and will return to Rice's Point with the empty unit train. The cars will be doubled or tripled into the yard tracks. The trip from Stinson to Rice's Point and the work of placing the cars requires less than 2 hours to perform.

The loading of the cars will take place at one of three elevators. Respondent serves the elevators which are adjacent to the Rice's Point Yard lead tracks. Each of the elevators has three or four tracks for loading and unloading freight cars. The empty cars in groups of 14 will be pulled from the yard and shoved to a spot adjacent to the appropriate elevator. Approximately 1 1/2 to 2 hours will be consumed in the four moves required to spot the empties. When the cars are loaded they will be returned to Rice's Point Yard in four separate movements by a yard engine. This should require the same amount of time as the placement of the cars. A transfer crew will run light with two engines from Stinson Yard to Rice's Point Yard and on arrival will assist the Rice's Point Yard engine in assembling the train and testing the braking system upon the completion of which it will transfer the loaded cars to Stinson Yard. The transfer requires about 6 hours. At Stinson Avenue Yard, after the road caboose and road power are added a[illegible]nother brake test performed, the train will be ready for departure to Chicago.

Respondent uses two locomotives one of 3,000-horsepower and the other 2,250 horsepower as head-end power in moving unit grain trains. Two 1,750-horsepower engines are also used as pushers to negotiate a grade from Superior to Hillcrest, Wis., the latter being 18.9 miles south of Superior. One 3,000-horsepower engine is used as a pusher from Shop's Yard at North Fond du Lac, Wis., to negotiate the Byron grade located 11.3 miles south or North Fond du Lac. This power is more than sufficient to move a train having a total trailing weight of approximately 6,500 gross tons. For the original trip the two head end power units will move light 211.6 miles from Stevens Point, Wis., to Superior. The helper power is available at Superior and Shop's Yard.

Train and engine crews for the original trip will need to deadhead over the territory as follows:

1. A crew deadheads from Stevens Point to Superior (211.6 miles) and handles the loaded train back to Stevens Point,
2. A crew deadheads 90.7 miles from North Fond du Lac to Stevens Point and works the train back to North Fond du Lac,
3. A crew moves the train 141.5 miles from Fond du Lac to respondent's Schiller Park Yard, Chicago, Ill., and deadheads back to Fond du Lac.

The entire 443.8-mile road-haul movement generally requires about 20 hours. At Schiller Park a transfer crew moves the train intact to the Erie's 51st Street Yard in Chicago. It returns to Schiller Park with the locomotives and caboose. The transfer crew is on duty about 5 hours and travels about 36 miles round trip.

An empty unit train returned by the Erie at the 51st Street Yard will be handled in the reverse of that described above, except that no deadheading of power is required. A Fond du Lac crew will deadhead to Schiller Park and move the train to Fond du Lac where another crew will take the cars to Stevens Point. The Fond du Lac crew will work or deadhead to its base. Only one 3,000-horsepower unit is required to move the train from 51st Street Yard at Chicago to Stevens Point, and at the latter point a 2,250-horsepower engine would assist from Stevens Point to Superior. The return trip will consume about 20 hours.

The second and subsequent movements, except the last trip from Twin Ports to Chicago and return, will be handled in the same manner as described above, except that there will be no need to deadhead locomotives and crew from Stevens Point to Superior because they are already there, having brought in the empty train. The crew would be held over at Superior in off-duty status for 16 to 22 hours. In the event the empty train arrives at Stinson Avenue Yard after 8: p.m., the cars would be placed at the elevator the following morning and the 24-hours free time begins to run from the time of placement. As the Buffalo unit train rate is used by several shippers, there are frequent occasions when on the arrival of an empty train from Buffalo, there is a fully loaded unit train ready to move, thus reducing the crew's layover time. Of course on the second and subsequent movements there is no need to gather freight cars.

The last trip from Twin Ports will be identical with the second and subsequent intervening trips as far as the loaded train movement is concerned. When the last empty train is received at Chicago, it will be moved to Schiller Park Yard by a transfer crew and the train will be broken up and the cars distributed to field locations as the needs of commerce might dictate. The empties would move out of Schiller Park in regular train service.

At Minneapolis the unit grain train will be loaded at the McMillan Elevator adjacent to respondent's Shoreham Yard. Cars for the first train will be gathered at the "Park" tracks located in the Shoreham Yard just east of the elevator, from normal releases of cars emptied in the area. The McMillan Elevator has 2 tracks which will each handle approximately 22 cars. Normally only one track is used to load unit trains. Three moves will be required to place 50 empty cars at the elevator. After completing the second and third drop of the empties, the yard engine would return with the loaded cars from the first and second trips. The yard engine's fourth trip to the elevator will be light, but it will return with the loaded cars brought in by the third trip. About 1 1/2-hours yard engine time is required for each of the four movements. Yard engines are always available at this location. Loaded cars are held on the yard tracks as they are returned.

When all 50 cars have been gathered they are doubled together by the yard engine, brakes are inspected, and caboose and two 3,000-horsepower locomotives are attached. Locomotives are readily available at Shoreham which is a major supply point for power. The two locomotives would remain for the entire 435.4-mile road haul to Chicago. An additional 3,000-horsepower unit would push the train from Shoreham for 2 miles over Central Avenue in Minneapolis and a similar unit would also push the train from North Fond du Lac to Byron, as previously described. A crew would be deadheaded to Shoreham Yard from Chippewa Falls, Wis., 100.2 miles. This crew will work the train back to Chippewa Falls. Another crew would deadhead 103.0 miles from Stevens Point to Chippewa Falls and return in service. From Stevens Point to Chicago the operation of the train would be identical in every respect to that of the one from Twin Ports. The return of the empty train from the Erie's 51st Street Yard in Chicago would be the exact opposite of the loaded movement and as described in connection with the Twin Ports operation but would be performed with one 3,000-horsepower locomotive.

The second and all subsequent movements, except the last trip from Minneapolis to Chicago and return, would be identical to the original trip described above, except there would be no need to deadhead a crew from Chippewa Falls to Shoreham Yard as the same crew which brought the empty train to Shoreham Yard would return the next loaded train to Chippewa Falls. As noted above the crew may have to layover, but there is more activity at Shoreham Yard and the layover would not be as long as might possibly occur at Twin Ports. As the empty cars would arrive with the returning train, no gathering of cars is involved.

The last trip from Minneapolis would be identical with the second and succeeding trips insofar as the loaded movement is concerned. When the last train is received at the Erie's 51st Street Yard in Chicago it would be transferred to respondent's Schiller Park Yard and the empties would be handled in ordinary train service. The 435.4-mile line-haul movement from Minneapolis to Schiller Park, and the empty return trip, would each take about 20 hours.

In the original statement circulated to all parties prior to the hearing, Erie stated that the contemplated unit train to Martins Creek would require six crews from point of receipt at the 51st Street Yard in Chicago to placement at Martins Creek. In the same statement it was indicated that two 3,600-horsepower locomotives would haul the train intact from Chicago to Martins Creek with one similar unit helping from Marion to Kent, Ohio, and two similar units assisting for a distance of 9 miles between Scranton and Elmhurst, Pa. At the hearing respondent modified its plan for operating the train with respect to the number of crews and locomotives to be used and in the handling beyond Portland, Pa.

At the hearing, Erie insisted that the 14-mile branch between Portland and Martins Creek could accommodate two 3,600-horsepower locomotives and that this would eventually be the way the unit train would be operated but in order to avoid any problems on the branch there would be certain modifications in the proposal as hereinafter discussed and these modifications would continue to be the practice until the track on the branch was updated.

As presently envisaged the train will move 835 miles from Chicago to Scranton substantially as originally outlined. There the two 3,600-horsepower engines will be replaced by three 2,500-horsepower units which will take the train about 61 miles to Portland. Six crews will be required to make the trip from Chicago to Scranton. The train will terminate at Portland where respondent has a breakup yard and the line-haul crew will move light to Scranton with one of the three 2,500-horsepower locomotives. There are two local switch crews that work the Portland-Bangor branch. They are based at Bangor about 7 miles from Portland. Depending on the time the train arrives at Portland both, one, or perhaps none of the two crew is at Portland. In the latter event a crew will have to travel from Bangor to Portland. The local switch crew using the two 2,500-horsepower units will divide the train behind the 25th car and proceed about 14 miles to the Martins Creek yard where the first 14 cars will be separated from the remaining 11 cars. The yard will accommodate about 55 covered hopper cars without blocking entry or egress to the yard. The two engines pulling 14 cars will then enter ConAgra's premises on track No. 2 lying west of the 12 grain storage bins. Though the record is not entirely clear it appears that the last 10 cars of the 14-car cut will be dropped on the south side of the unloading pit. The locomotives with the remaining four cars will then move several hundred feet south onto a stub end switch which leads to track No. 4. When the switch is cleared the train will then back out of the switch and move north on a connecting track which leads to track No. 4. The latter is a north-south track, paralleling track No. 2 but on the east side of the 12 grain storage bins. The four cars will be placed near the unloading pit. The locomotives will uncouple and reverse their course and enter the switch. From the switch they will move north on track No. 1 and will leave the premises. The crew will immediately couple the locomotives to the 25th car and begin pushing the 11-car cut into the plant premises on track No. 1. The transfer will proceed until the first car is on the south side of the unloading pit. The crew will then return 14 miles to Portland to pick up the remaining 25 cars and bring them to the Martins Creek Yard which is about 1/3 mile north of the ConAgra facility. When this is completed the crew goes about its normal switching duties or as the case may be, off duty.

ConAgra personnel unload the cars by either pushing them or allowing them to roll by gravity so that the discharge gate on the underside of the hopper car is directly over the pit which is to receive the wheat. After the car is unloaded it moves by gravity or with some shipper assistance to the north end of the plant.

A crew from Croxton, N.J., Erie's eastern terminus and about 81 miles from Bangor, will deadhead from Croxton by auto, bus, or locomotive to Bangor where it will pick up the two 2,500-horsepower locomotives and proceed to the ConAgra facility and collect the first 25 cars which have been emptied pulling them from the shipper's premises into respondent's Martins Creek Yard. The same crew will then proceed to place the second group of 25 cars in the same fashion as was done with the first group. When this is completed the 25 empty cars will be taken to Portland at which point the Croxton crew returns to base. Travel time for Croxton to Bangor is less than 3 hours.

One of the 2 Bangor switch crews will gather up the second group of 25 cars on ConAgra's premises and take them to Portland where they will be coupled to the first group and the train is then ready for its westbound movement. A crew from Scranton moves light from that point to Portland and begins moving the train westward. The local Bangor switch crew will then board the switch engine which has been sitting at Portland and go about its customary tasks. Work performed on the unit train by the local crew based at Bangor and the Croxton crew will consume about 7 hours. Total lapsed time from arrival of the loaded train at Portland to departure of the empty train from that point is estimated to be 30 to 37 hours. According to the tariff, free time commences to run from the first 7 a.m. after actual or constructive placement.

Respondent Erie's manager of transportation concedes that the operation as he testified to involves more time and expense than does the type of operation contemplated in the original statement submitted as exhibit 3. But he does not believe the modifications are substantial inasmuch as the 14-mile journey from Portland to Martins Creek is said to be in the nature of terminal handling. No switching study was made of the Portland to Martins Creek segment of the movement prior to publication of the proposed rates.

## APPENDIX B

### *Shipper supporting respondents*

ConAgra, Inc., Omaha, Nebr., is a producer of grain derived foods for human and animal consumption, operating 15 flour mills in the United States with 1 each in Alabama, Georgia, Florida, California, Illinois, Montana, Minnesota, Texas, 3 in Pennsylvania at Martins Creek, Red Lion, and Treichlers, and 4 in Nebraska. The company has experienced rapid expansion since 1963 when it was operating only four mills. Since 1963, sales have increased from about $76 million to about $420 million. The company's General Traffic Manager, Mr. Stone, testified at the hearing.

Production commenced at Martins Creek in May 1973. As the plant will produce flour for the baking industry it is dependent on receiving hard spring wheat grown in Minnesota and the Dakotas. It is designed to produce 6,000 hundredweights of flour daily or 1,560,000 hundredweights yearly. In terms of wheat requirements the mill grind is 13,800 bushels daily or 3,588,000 bushels annually. About 130 pounds of wheat or 2.3 bushels is required to produce 100 pounds of flour. During the period from May 1 to November 30, 1973, 533,801 bushels of wheat arrived by rail in the service of respondent Erie and 248,120 bushels by nonregulated motor carriage. Railcars unload at elevators known as the B plant about 1.1 miles from the A plant where the wheat is ground into flour. Motor carriers unload at the A plant. The storage capacity of the A plant is about 1 million bushels, while that of the B plant is 300,000 bushels. As of the hearing, 650,000 bushels of soft wheat and 200,000 bushels of hard spring wheat were in storage. The former is held for the use of the company mill at Treichlers about 27 miles west of Martins Creek. Because the Martins Creek mill is far removed from the wheat growing area more grain is carried in storage than would be necessary if the plant was closer to the North Central States where hard spring wheat is grown. Most outbound shipments will be in bulk form.

ConAgra intends to build a durum mill at Martins Creek with a capacity to produce 5,000 hundredweights of durum floor daily. This facility will draw on durum wheat which is grown in the same general area as hard spring wheat. A flour mill will be opened at Hudson, N.Y., in the near future. It will have a capacity of 4,000 hundredweights daily and like Martins Creek will grind hard spring wheat. The company is committed to placing flour mills as close as possible to the consuming markets and the mill at Martins Creek is an example of this practice. Martins Creek is in the eastern edge of Pennsylvania on State Highway 611 about midway between Interstate Highways 78 and 80. It is within 75 to 90 miles of major consuming markets at Philadelphia, New York City, and northern New Jersey.

The placement of flour mills close to consuming markets is neither new nor uncommon. Most of the protestant millers have followed the practice, the impetus for which is the fact that grain in large volumes can be transported cheaper than single cars of flour thus creating a situation where transportation charges are reduced as mills move closer to the consuming market. Four of the six protestant millers offering evidence at the hearing have wheat grinding facilities at Buffalo and take advantage of low cost lake vessel shipping charges or the Buffalo unit train rate. There are flour mills at many large consuming centers including such markets as Chicago, Ill., St. Louis, Mo., Los Angeles and Oakland, Calif., Seattle, Wash., Portland, Oreg., Denver, Colo., Charlotte, N.C., Tampa and Jacksonville, Fla., and Culpepper, Va. Several protestants operate mills at these points.

The Buffalo mills are able to market flour in Pennsylvania, New York, New Jersey, Maryland, Delaware, and the District of Columbia with a total population of 55,127,000 persons. The per capita consumption of flour is about 109 pounds annually and on this basis the above area has a total consumption of 60,088,430 hundredweight. ConAgra's production of 1,560 hundredweight represents an ability to supply about 2.5 percent of the market. The flour mills at Buffalo can produce 83,900 hundredweight of flour daily or 21,814,000 hundredweight annually. Thus they have the capacity to serve 36 percent of the eastern market. Buffalo and Martins Creek together can serve only about 38.5 percent of the market.

ConAgra does not own or control elevator storage capacity at Twin Ports or Buffalo and has no desire to do so. The protesting millers have storage capacity of almost 12 million bushels at Twin Ports and close to 21 million bushels at Buffalo. Heretofore the shipper's wheat requirements have been supplied from the Buffalo facilities of General Mills and Standard Milling Company. ConAgra's witness does not know how that wheat reached Buffalo but it could have moved in the Buffalo unit train. Respondent Erie has handled about 68 percent of the shipper's wheat traffic with the balance moving in nonregulated motor carrier service. Much of the traffic has moved in Erie equipment, but when not available the shipper has furnished its own hopper cars. ConAgra has a fleet of 150 covered hopper cars and has used as many as 10 in the Buffalo-Martins Creek run, though as of the hearing date somewhere between 3 and 5 cars were being used. Since December 1973, Erie has not paid mileage allowances.

Delays have been encountered in receiving rail grain from Buffalo and on several occasions the Martins Creek plant has been on the verge of closing because shipments did not arrive on schedule. In October 1973, a trailerload of wheat was shipped in private carriage from Philadelphia. The delays are attributed to congestion at respondent Erie's railroad yard and to the inability of one of the two Buffalo suppliers to simultaneously unload vessels and load rail carriers. Efforts have been made to have Erie improve the service out of Buffalo. Erie's offer to establish a unit train rate of 34 cents from Buffalo to Martins Creek provided ConAgra would furnish the hopper cars was not accepted because it would mean a total cost of about 45 cents a 100 pounds. The shipper considered the use of its private motor equipment to move wheat from Buffalo to Martins Creek, but the arrangement was thought to be too costly. If it must continue to rely on Buffalo as a source of wheat a more consistent and reliable outside trucking service will be sought. However, ConAgra refused to become entirely dependent on any one mode of service or source of supply.

The proposed adjustment will permit the purchase of wheat from firms which are not competing for flour sales in the eastern markets. There are a number of grain merchandising firms at Twin Ports and Twin Cities which are willing to sell wheat and which do not compete in the manufacture of flour. The witness had no knowledge as to how much of the company's requirements would originate at Twin Ports as distinguished from Twin Cities.

ConAgra shows that the alternative transportation costs are substantially the same as those described by respondent Soo. The motor carriers which handled 32 percent of the inbound shipments of wheat charged from 33.33 to 36.67 cents or a statistical average of 35 cents a 100 pounds. The actual cost of rail delivered wheat is 2 cents higher than the figures reported by Soo because rail delivered wheat is unloaded at plant B and must be trucked to plant A at a cost estimated to be about 2 cents a hundredweight using private carriage.

In excess of 80 percent of the flour produced at Martins Creek moves in the shipper's private carriage operation to points in an area which generally lie within 100 miles of the plant. Precise records are kept of the cost of providing this service. To the important markets of Philadelphia, Hackensack, N.J., and Brooklyn and Jamaica, N.Y., the cost to the shipper is 29, 30, 33, and 34 cents per 100 pounds, respectively. Most of the production moves to accounts where the cost of private carriage ranges from 29 to 34 cents.

ConAgra solicits all users of bakery flour, large and small, whether on rail or off rail. Generally the large bakeries are located on rail and are oriented toward receiving bulk flour by covered hopper car. Many have never received a shipment by truck except perhaps in emergencies. Most bakeries which receive bulk flour by rail can accept delivery by truck with little or no modification of the plant's equipment. The shipper is selling bulk truck flour to a bakery in Philadelphia and one at Jamaica, both of which are on rail. ConAgra's driver connects the vehicle's discharge system to the baker's inlet tube, whereas on rail deliveries the baker must make the hookup. Sack flour is placed on pallets and the pallets are loaded on the trailer or boxcar by forklift. At destination the baker unloads by use of a forklift. Demurrage charges are not assessed customers who delay the unloading of a vehicle, but if the delays are chronic the price to the customer will reflect the extra cost of service.

ConAgra compares its total costs to the aforesaid four markets with those incurred at the same markets by the Buffalo millers. To determine its costs the witness combines the proposed 72.25-cent rate on wheat to Martins Creek, the 2-cent transfer cost from plant B to plant A, and the aforementioned private trucking charges. On this basis the total delivered cost is $1.0325 to Philadelphia, $1.0425 to Hackensack, $1.0725 to Brooklyn, and $1.0825 to Jamaica.

Taking information furnished by protestant flour mills on September 5, 1972, in their petition for suspension of the rate proposed in I. and S. Docket No. 8784, the shipper shows that the average cost of moving wheat to Buffalo (apparently during the 1972 season) was 30 cents a 100 pounds. Adding this to the Penn Central rail rate of 58 cents, minimum 50,000 pounds, at the Ex Parte No. 299 level, produces a through charge to all the four named points of 88 cents. During the season of closed navigation the Martins Creek cost will increase 15.75 cents by reason of the 88-cent proposed rate which will take effect during this period. The above comparison is said to show that the Buffalo millers have an important advantage.

Regarding protestants' criticism that the September 15 expiration date of the proposed tariff provides ConAgra with an outdated water factor for the coming year, the latter notes that the Buffalo unit train rate expires on the same date and that rate is also based on the water factor. Furthermore, protestants' argument assumes that lake vessel charges are widely erratic. During the 1973 season of open navigation charges ranged from 15 to 16 cents a bushel or 25 to 26.67 cents per hundredweight or an average of 25.83 cents. During the 1966 season vessel charges ranged from 10 to 13.5 cents a bushel, whereas, during 1971 the range was from 14.5 to 17 cents. As these rates are exempt from Commission regulation the law of supply and demand is the biggest influence in the level of the charge. It is clear ConAgra insists that lake vessel rates are stable and there is every reason to believe that the stability will continue into the 1974 season especially when it is realized that the volume of lake vessel grain to Buffalo is declining. Should the 1974 lake vessel charge be higher than the 26.67 cents used in constructing the proposed 72.25-cent rate, ConAgra will not object to respondents' increasing their charge to take into account the current lake vessel cost.

On November 27, 1973, the witness contacted Penn Central's district sales manager in Omaha, Nebr., Mr. Ryan, seeking to have the latter furnish equipment for the movement of grain from Buffalo to Martins Creek. By letter of December 4, 1973, Mr. Ryan advised the witness that his request was referred to Philadelphia. The letter further stated that covered hopper cars are in short supply and that Buffalo shippers were experiencing delays of 4 to 6 weeks in obtaining equipment. It was suggested that an order be placed for equipment so that ConAgra could be placed on the waiting list. The witness asked to be put on the waiting list, but up to the time of the hearing he has not been advised when cars will be available. ConAgra did not offer to furnish Penn Central any of its equipment.

The witness is acquainted with Mr. Paul Olson, Director—Market Planning and Research for Penn Central and Mr. George Wallace, Vice President of Marketing for the railroad, and has had discussions with these people concerning rates on the movement of wheat to Martins Creek. He did not seek their assistance in obtaining equipment because their titles indicated that they had no car supply responsibilities.

### PROTESTANT FLOUR MILLS

The following discussion treats the evidence of each protestant separately, but in the interest of avoiding needless repetition, comments raised by more than one of the parties are discussed but once.

Peavey Company is a merchandiser and processor of grain and grain products operating nine flour mills in the United States with a combined milling capacity of 89,800 hundredweight daily. The mills at Buffalo can produce 10,500 hundredweight of flour and 5,000 hundredweight of durum daily. The company has five grain elevators at Twin Cities with a combined capacity of 11,100,000 bushels, one at Twin Ports with a capacity of 4,246,000 bushels, and one at Buffalo capable of storing 3,250,000 bushels. The elevators at Twin Cities and Twin Ports are served by either Burlington Northern or the Chicago North Western, while the facilities at Buffalo are local to Penn Central. However, all rail lines serving the above-named points can reach Peavey through reciprocal switching arrangements. The Buffalo facilities are on the Buffalo River which empties into Lake Erie and are, therefore, accessible to lake vessels.

As a merchandiser of grain Peavey has sold wheat to many milling companies. Sales have been made to ConAgra, but the witness had no knowledge of the size of the transactions or the destination of the shipments, and such sales as were made occurred more than 5 years ago. ConAgra has not sought to purchase wheat at Buffalo and protestant has not solicited business. In fact, because of the short supply of wheat at Buffalo, protestant is not presently in a position to sell to outside accounts. Upon receiving an appropriate and timely request Peavey, as well as protestant International Multifoods, would be willing to enter upon meaningful negotiations. However, it is not a common practice to sell wheat to be milled into flour to a company which competes in the production of flour.

In years past it was the practice of the Buffalo mills to store their winter grind of wheat in lake vessels which spent the season of closed navigation tied to the Buffalo piers. This custom was not followed during the winter of 1973-74. The witness was not able to explain the departure from customary practice but he concedes that in discussions preceding the close of navigation the high cost of ownership was mentioned as a possible reason for the failure to store wheat at Buffalo lakeside, but he is of the impression that this was not necessarily the controlling consideration.

The Buffalo unit train rate was not designed to compete with lake vessel transportation during the open season of navigation. The rate was too high to serve such a purpose. Rather it was offered as an alternative to the practice of shipping wheat in lake vessels near the close of the navigation season and storing the wheat in the lake vessels during the cold months and then using the wheat during the winter grind season. The Buffalo unit train rate was competitive in this situation because the Buffalo millers, in addition to the water transportation charge, incurred costs relating to storage on the lake vessel, interest on the money invested in the wheat, insurance, and possible fluctuation in the price of wheat during the period of storage.

With but one possible exception, all of the unit train shipments to Buffalo have moved during the season of closed navigation. During the period 1973-74 season up to the date of hearing, there have been four unit train shipments. Three were originated at Twin Cities by Burlington Northern and one at Superior by Soo. The latter moved about mid-January 1974. Until recently Soo declined to furnish cars stating that it had a prior commitment to ConAgra and to industries served direct. The elevator at Superior, which is served by the Chicago North Western and respondent, indicated that the time required by the former to switch the train added to the total turnaround time of the movement. No complaint was made of the length of time required by Peavey to load and unload the cars. Covered hopper cars are in short supply for all lines serving Twin Ports and Twin Cities and Peavey is concerned as to whether it will be able to obtain sufficient wheat to sustain the Buffalo mill. It is hopeful of moving 10 more unit trains. There have been no movements by the Chicago North Western but consideration is being given to the use of this carrier. Within a 6-week period preceding the hearing protestant was compelled to move 80 carloads of wheat at the single-car rate of 0.105 cents.

Though the Buffalo unit train rate is 43 cents, shippers at Twin Ports or Twin Cities owning grain which originated in the country during the period prior to the latest general increase could move the grain out of the elevator at the rate level which prevailed at the time the grain moved from the country origin. Peavey concedes that its recent shipments could have moved at a rate less than the current 43-cent level. Because of a limiting provision in the tariff under consideration, ConAgra could not realize such an advantage.

From its inception the Buffalo unit train rate applied from Twin Ports and Twin Cities. Peavey did not request Soo to include Twin Cities in the tariff, but neither did it oppose this phase of the proposal. It would prefer to originate trains at Twin Ports (Superior), but until recently Burlington Northern was the only carrier which would guarantee equipment and it would, therefore, oppose any effort to cancel application of the rate to Twin Cities. Protestant notes that Burlington Northern does not participate in the rate from Twin Ports and, therefore, Twin Cities could not be considered as an intermediate point. Twin Cities is not intermediate between Twin Ports and Chicago so far as the Soo or the Chicago Northern Western are concerned. Thus Peavey submits there is little likelihood of a fourth section problem developing in the event other railroads should elect to join in the Martins Creek rate.

Extending ConAgra the same rate from Twin Cities as from Twin Ports is an advantage. First, water competition may possibly justify a water compelled rate from Twin Ports, but Twin Cities is 150 miles west of Twin Ports and there is no water transportation from this point. Furthermore, the price of wheat may vary between the two origins and this may give ConAgra the advantage of buying from the cheapest source. The Buffalo unit train rate is not competitive with the lake vessel mode during the season of open navigation. ConAgra, while purporting to seek only what the

Buffalo millers have, is really getting a rate competitive with the lake vessel charge during the season of open navigation. The Buffalo unit train rate gives the Buffalo millers an alternative source of supply, but only during the season of closed navigation. They do not have a viable alternative transportation service during the season of open navigation.

The Buffalo unit train rate had been published with an expiration date. As the expiration date approaches the railroads and interested shippers consider the various factors which will influence the level of the rate for the approaching season of closed navigation. Among elements considered are general rate increases, changes in vessel rates and storage costs, insurance and interest costs, and wheat prices. Over the years there have been changes relating to the type of equipment to be furnished, the governing minimum weight, and demurrage rules. Presently, the rate is not subject to an expiration date.

Peavey objects to the September 15 effective date provided for in the proposed schedule. Such an effective date is not objectionable insofar as the Buffalo unit train rate is concerned because this rate has practical application only during the season of closed navigation. At the time the rate becomes effective all factors pertinent to the winter storage in lake vessels are known and have been the subject of discussion between the railroads and the interested shippers, though it is conceded that there is an element of uncertainty regarding the level of wheat prices. It is conceded that the railroads have been accurate in estimating the alternative costs and that the rate is at a lawful level.

In contrast the proposed 72.25-cent rate will apply on rail movements during the open season of navigation to begin about April 1974. At the time the rate level was set, which was actually a month or more prior to September 15, there was no way to know what the lake vessel transportation charges and other related costs will be when the season of navigation opens about April 1974. Peavey believes the unit train rate for the open season of navigation should be set to become effective about the end of February.

The protestant mills' marketing area includes New York, New Jersey, eastern Pennsylvania, Delaware, Maryland, and the New England States, and they compete with each other, with ConAgra, and with midwestern mills for sales in this area. Most customers in this area are beyond feasible trucking distance (150-200 miles) and can only be served by rail. A large and ever increasing number of bakeries are not located on rail sidings and to compete for this market the Buffalo mills must move their flour by railcar to rail bulk terminals like those at Rollins Terminal, Norristown, Pa., and Brooklyn Eastern District Terminal, Brooklyn, N.Y., where the flour is transferred from the railcar to motor trailers or to temporary storage. The record does not reveal the percentage of Peavey's total flour production which moves through the above-named facilities.

The Buffalo mills submit that ConAgra in computing their cost of delivering flour gave no consideration to the expense incurred by reason of the transfer of flour from railcar to motor bulk trailer and the cost incurred by the movement of the flour from point of transfer to final destination. Peavey takes the costs of the Buffalo mills as shown by ConAgra but makes certain adjustments to bring them up to date as well as to reflect the entire expense. Thus it shows that the 1973 cost of lake vessel transportation to Buffalo was 32.85 cents[1] as contrasted with the 30-cent figure shown by

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[1] Peavey's actual cross-lake experience during the 1973 navigation season was that the average cost to move grain from Duluth-Superior to Buffalo including brokerage, freight, overtime (footnote continued on following page)

ConAgra. The rental cost of an air-slide bulk flour car was 6.07 cents, the car cleaning cost 1.17 cents, the cost of transferring the flour at Rollins Terminal was 3 cents, sifting the flour during the transfer 1 cent, and the cartage cost from Norristown to Philadelphia 26.5 cents. On this basis the Buffalo millers' transportation cost of delivering flour at Philadelphia is $1.2859 a 100 pounds, rather than the 88-cent figure shown by ConAgra. ConAgra's cost as shown by its own witness is $1.0325.

To Brooklyn and Jamaica, N.Y., the various cost factors would be the same as those to Philadelphia, except that the cost of truck delivery through Brooklyn Eastern Terminal is 12 cents. The total cost to these two points is said to be $1.1009, rather than the 88-cent figure shown by ConAgra, whose cost to these two points is shown to be $1.0725 to Brooklyn and $1.0825 to Jamaica. To Hackensack, N.J., protestant computes the same cost factors, except that the cost of truck delivery through Brooklyn Eastern District Terminal is 18 cents. Thus protestant's total cost is $1.1609, as contracted with the 88-cent figure shown by ConAgra. The latter's cost to the same point is $1.0425. The above comparisons relate only to bulk flour deliveries. The differential in favor of ConAgra would be even greater on movements of sack flour because of the expense of transferring the sacks from railcar to motor vehicle. Protestant had no documents showing that it paid the aforesaid truck transportation charges and it appears that the cost of this service is usually borne by the consignee. Regardless of who pays for truck delivery of bulk flour, there is a cost for this service which the customer must take into account in deciding whether to buy from Buffalo or Martins Creek. Protestants, in order to compete with ConAgra's free delivery, will be forced to assume the cost of truck delivery.

Protestant submits that the extent of the advantage afforded ConAgra by the proposed rate is not fully reflected in either the shippers study or the above revisions. First, when flour is tranferred from railcar to motor trailer up to 1 percent is lost, that is, it remains either in the railcar or the truck or is dissipated into the atmosphere during the transfer operation. ConAgra operates under no such handicap. Second, the cost of moving grain from Twin Ports to Buffalo in 1974 most certainly will be greater than in 1973. In the single item of fuel above there will be significant increases.

Under the proposed adjustment ConAgra will be paid mileage allowances in the event it provides freight cars. There is no comparable provision in the tariff governing the Buffalo unit train rate. This accords ConAgra a significant advantage over its Buffalo competitors. Peavey has about 275 covered hopper cars and has discussed with Soo use of these cars in the Buffalo unit train movement.

Standard Milling Company operates a 13,000-hundredweight flour mill at Buffalo served by Penn Central. About 1.5 miles away on the Buffalo River there is a 5-million-bushel elevator served by respondent Erie. Grain is moved by an independent contract trucker from the elevator to the mill for grinding. Both the Erie and protestant Penn Central are providing adequate service at Buffalo. The mill grinds about 12,000 hundredweight of wheat flour daily, of which about 95 percent is of the bakery variety. The balance of the milling capacity is taken up with production of rye flour.

Elevator service is provided at Buffalo for outside accounts and wheat is sold to such accounts, one of whom has been ConAgra, but this is not a common practice.

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(footnote 2 continued)
charges, vessel demurrage, and maritime insurance was 17.20 cents per bushel, or 28.67 cents per hundredweight of wheat. Factoring this by 8.5 months of 28.67 cents and 3.5 months at 43 cents for unit trains during the closed navigation season produces an average cost of 32.85 cents hundredweight.

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The witness doubts that Standard sought out ConAgra. The latter could, however, purchase its own wheat in the West, arrange for transportation to Buffalo, and Standard would store the wheat in its elevator until such time as it is needed. The elevator is capable of simultaneously receiving wheat from a lake vessel and at the same time loading a waiting railcar or motor vehicle.

In years past Standard relied on grain stored in lake vessels for much of its winter grind. It is not doing this during 1973-74 closed season of navigation because of problems associated with financing the winter storage. A lake vessel will hold between 500,000 and 1 million bushels of wheat. The witness estimates the cost of ownership as 1 cent a bushel per week. This burden applies regardless of where the wheat is stored, but the cost would be greater at Buffalo, and even greater at Martins Creek, in comparison with the cost at Twin Ports, because the transportation charges are included in the total value at Buffalo and Martins Creek.

During the present nonnavigation season Standard expects to receive all its wheat at Buffalo by rail service. As of the hearing there have been two unit train movements both of which were originated by Soo at Twin Ports. The latter will continue to be the source unless supplies are exhausted. Most of the cars dedicated to the unit train are owned by respondent Erie and it is anticipated that the equipment will continue in unit train service for the balance of the season. Though the actual service provided is satisfactory, respondent Soo is unable to provide sufficient equipment to meet the shipper's needs. Recently arrangements were made with Chicago and North Western for movement of a unit train comprised of boxcars; the rate for this service is higher than that charged by Soo. Because of the shortage of equipment protestant has caused between 10 and 20 single carloads of wheat to be moved to Buffalo. It shares Peavey's concern as to whether there will be sufficient wheat in Buffalo for the winter grind.

About 35 percent of production is delivered in bulk form and the balance in 100-pound bags. The trend toward bulk deliveries is increasing. Standard relies except in emergencies on railcars to deliver flour in the eastern market. For customers who receive by truck, the contents of the railcar must be transferred to a motor truck. During 1972, 2,856,454 hundredweight or 2,850 cars of flour moved by railcar to the Brooklyn Eastern District Terminal. In 1973 the corresponding figures were 3,148,137 hundredweight or 3,159 cars. The witness was not able to state how much of this flour originated at Buffalo. A predominate portion of the traffic to the New York City area both bulk and bag is actually delivered by truck. At Philadelphia, the predominate share is delivered by rail. Protestant shows the cost of transferring flour from railcar to truck at Brooklyn Eastern District Terminal and the motor carrier charge for moving the flour from the terminal to accounts in New York City. The amount of these expenses are similar to those shown by protestant Peavey. A schedule of truck charges in the possession of protestant discloses that a truckload of sack flour incurs a charge of 25 cents a 100 pounds for movement by Tri Borough Transportation Company from Brooklyn Eastern District Terminal to points in the Bronx, Brooklyn, Queens, and Manhattan. There is an additional 25-cent charge for deliveries to Staten Island and points in the nearby New Jersey area.

The Pillsbury Company, Minneapolis, Minn., is a merchandiser and producer of grain and grain products. The mill at Buffalo has the capacity to produce 17,500 hundredweight of flour daily. Prior to January 2, 1972, when a fire forced the closing of the mill, the capacity was 28,000 hundredweight. Because of the fire little flour was milled in 1972. As of the hearing, the plant was operating on the average of almost 6 days a week. There are no present plans to increase production. Also at Buffalo is a 2,225,000-bushel elevator. Both the mill and elevator are accessible to water transportation and are served by the Buffalo Creek Railroad.

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Protestant shows that at Twin Ports there are 12 elevators with an aggregate capacity of 76,957,000 bushels, while at Twin Cities there are 38 elevators with a capacity of 117,162,100 bushels. Pillsbury's two Twin Cities elevators have a storage capacity of about 4 million bushels. Respondent Soo serves three elevators at Twin Cities but none belongs to protestant. At Twin Ports Soo serves two Cargill and one International Multifoods elevators, and through a jointly owned switching line it serves still another elevator. Protestant has no elevator capacity at Twin Ports.

Protestant is critical of the proposed rates on several grounds. First, the 72.25-cent rate is unrealistically low in view of the fact that it is based in part on 1973 water carrier costs. ConAgra's testimony shows that the average lake vessel charge in 1973 was 2583 cents and that lake vessel charges increased about 45 percent from 1966 through 1971, or an average of about 7.5 percent yearly. Application of such an increase to the average 1973 charge produces a figure of 27.77 cents (25.83 + 1.937). Protestant has already signed one agreement for lake vessel service and though the agreement was not in the hearing room, it believes the 1974 lake vessel charges will be in the range of 29 to 30 cents.

Criticism is directed at ConAgra's use of a 30-cent lake vessel factor in constructing the laid down cost of flour experienced by the Buffalo millers. This figure was taken from one of protestants' pleadings filed in I. and S. Docket No. 8784. As the 1974 navigation season is close at hand it is clear that this figure is no longer valid.

ConAgra is also said to have understated the handicap incurred by the Buffalo mills in competing for traffic moving to receivers who prefer motor delivery. Recently protestant lost a large bakery account in Waterbury, Conn. This customer is not on rail and it is necessary for the flour to be trucked from a nearby rail siding. Protestant does not show the volume of sales in the New York City and Philadelphia areas on the tonnage which moves to the rail transfer terminals at Norristown or Brooklyn Eastern District Terminal.

A study of the transit time on railcar shipments of flour dispatched from Buffalo and 10 other terminals during the last 6 months of 1973 shows that Buffalo's record was one of the best in that 91 percent of the cars arrived on schedule. In contrast at Kansas City only 68 percent moved on time. Problems will develop from time to time at all terminals including Portland and Martins Creek. The witness is confident the Erie will continue to improve the operation of its Buffalo terminal. Protestants Peavey, Standard Milling, and International Multifoods find the rail service at Buffalo to be generally satisfactory.

Protestant sought to have Soo move a unit train to Buffalo during the latter part of 1973, but respondent was unable to supply equipment. The train was originated by Burlington Northern and moved from Twin Cities. During the balance of the 1974 season of closed navigation protestant intends to move 17 trains of which 6 will come out of Twin Cities and the balance Twin Ports. It is hoped that the cars dedicated to the service of protestant Peavey will be made available when the latter has completed its movements. However, it fears that Peavey will not complete its movements until April 1, 1974. As a result protestant may have to use the higher priced service offered by the Chicago North Western. About 75 percent of protestant's flour traffic moves out of Buffalo is shipper-owned equipment because the financial straits of the eastern railroads have made it difficult for them to supply sufficient equipment. Soo's commitment to ConAgra and lack of commitment to protestant is said to be discriminatory. Pillsbury finds it difficult to understand in view of Erie's financial plight why respondent would sacrifice handling wheat a distance of 341 miles from Buffalo to Martins Creek at a rate of 40 cents in favor of receiving about 47 cents for a haul of 910 miles from Chicago to Martins Creek.

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International Multifoods Corporation is a diversified producer of food products with the milling of flour accounting for about 50 percent of the company's activities. There are six flour mills in the United States having a combined daily milling capacity of about 50,000 hundredweight, with the mill at Buffalo accounting for 21,500 hundredweight. Each mill has extensive storage facilities. The elevators at Buffalo can hold 4,660,000 bushels. The witness does not know whether the elevator can simultaneously load railcars or trucks while unloading lake vessels. At Duluth the grain storage capacity is 4,200,000 bushels. The Buffalo mill and elevators are located on the Buffalo River near Lake Erie and are served by Penn Central, which handles the bulk of the shippers flour traffic, though respondent Erie and the Lehigh Valley also handle some traffic.

During the last 6 months of 1973, production at Buffalo was about the same as for the corresponding period of 1972. Milling operations are carried on 6 to 6.5 days a week. Though protestant's mill is significantly larger than the Martins Creek plant, the latter's 6,000-hundredweight capacity can be doubled. In addition, a 4,000-hundredweight durum mill is planned at Martins Creek, as well as a new 4,000-hundredweight capacity flour mill at Hudson, N.Y. Protestant believes that in sales to the baking industry ConAgra is the largest producer in the country.

About 60 percent of the Buffalo production moves in bulk form and the balance in 100-pound sacks. The trend to bulk shipments is increasing. About 3 percent of Buffalo's bulk flour production and 6 or 7 percent of the sack flour moves to Brooklyn Eastern District Terminal. Somewhere between 5 and 10 percent of hard wheat flour sales in the eastern market originate at the company's midwestern mills.

Protestant lists 158 bakeries in the eastern market, of which 56 are on rail. About 86 of the bakeries receive bulk flour, of which slightly more than half are on rail. Protestant concedes that though more bakeries are off rail than on rail, the larger bakeries are on rail and collectively they purchase more flour than the more numerous small accounts, most of which are off rail. Protestant shows that the cost associated with the transfer of flour from railcar to truck and delivery by the latter mode are at about the same level as testified to by other witnesses. On or about December 21, 1973, protestant incurred a motor carrier charge of 14 cents per 100 pounds for the transportation of flour from Brooklyn Eastern District Terminal to the A & P Bakery in Newark, N.J. Generally, however, in the area served out of the latter terminal the receiver arranges for the motor carrier transportation, but in most other areas the flour miller arranges for the motor carrier transfer and delivery and adds the cost of these services to the price of the flour. At certain other locations such as Holyoke and Worcester, Mass., and Waterbury, Conn., railcars are placed on team tracks and portable unloaders are used to transfer the flour to bulk trailers for delivery to the consignee. In such instances the cost of transfer and motor carrier delivery averages about 14 cents per 100 pounds. Sack flour destined to off rail bakers must be removed from the boxcar to a truck and then moved to the consignee's location. The cost for this service ranges from 15 to 25 cents a 100 pounds. A large percentage of the sack flour which moves to Brooklyn Eastern District Terminal is delivered to accounts who maintain warehouse space at the terminal.

Even under the existing rate structure ConAgra has been able to penetrate the eastern market, though the full impact will not be felt until about August 1974. Already three bakery accounts in Massachusetts, one in Waterbury, Conn., and the A & P Bakery in Philadelphia have been lost. The latter bakery is on rail and buys about 6,000 hundredweight weekly. The Waterbury account was formerly served by one of the protestant mills before International gained the account.

ADM Milling Company, Overland Park, Kans., operates nine flour mills, two corn mills, one bulgur plant, and numerous country and terminal grain elevators. Flour sold in the eastern market is mainly produced at mills in Minneapolis, capacity 9,500 hundredweight daily, Red Wing, Minn., capacity 5,000 hundredweight daily, and at Des Moines, Iowa, capacity 7,000 hundredweight daily. The company has a durum mill at Minneapolis capable of producing 12,000 hundredweight of pasta flour daily. None of the mills is served directly by respondents, though Soo has reciprocal switching arrangements with the Milwaukee Railroad which actually serves the Minneapolis flour mill.

ConAgra's proximity to the eastern market and its ability to offer truck delivery gives it an advantage in relation to a company such as protestant which relies on rail transportation from the Midwest. ConAgra's product is freshly ground and the customer need not carry a large inventory because fresh quantities can be obtained from a close by source. On truck deliveries the driver connects the vehicle's discharge apparatus to the baker's intake pipe, whereas, on rail deliveries an employee of the baker must make the connection. In the witness' experience when bakers have a choice as between rail and truck delivery they will opt for the latter. Ordinarily a shipper equipped to receive rail bulk flour can readily receive bulk flour by truck.

Protestant does not object to ConAgra's right to locate a mill wherever it chooses, but it objects to the 72.25-cent rate on the grounds that it gives ConAgra an unfair advantage in competing with protestant for sales in the eastern market. Even under the existing rate and cost structure ConAgra has sold flour to accounts which formerly purchased from protestant. Thus, for example, by using the 43-cent unit train rate to Buffalo, a 5-cent handling charge at Buffalo, the 40-cent rate to Martins Creek, a 2-cent transfer expense from the B plant to the A plant at Martins Creek, and a truck delivery cost of 29 cents from Martins Creek to Philadelphia, ConAgra can sell flour in Philadelphia at a cost of $1.19.

In contrast, protestant's cost of moving flour from Minneapolis to Philadelphia in rail service is a rate of $1.18 plus the cost of transferring the flour from railcar to truck and the trucking cost to accounts in the Philadelphia area of 25 cents, producing a total cost of $1.43 as against ConAgra's cost of delivery of $1.19. ConAgra's 24-cent advantage is on the conservative side in that it does not take into account the unregulated motor carrier transportation available from Buffalo to Martins Creek. Should the proposed 72.25-cent rate become effective ConAgra's total delivered cost in Philadelphia would be $1.0325 resulting in a 39.75-cent advantage. The mills at Red Wind and Des Moines sell in the eastern market and will experience the same handicaps as the Minneapolis mill. Both purchase wheat on the Minneapolis market and ship flour to the East under the same rate structure as does Minneapolis.

On cross-examination protestant conceded that ConAgra would have to move 138 pounds of wheat to Martins Creek to obtain 100 pounds of flour, and, therefore, it would appear that in the above comparison, ConAgra's existing 90-cent cost from Twin Cities or Twin Ports to Martins Creek should really be $1.24, which when added to the 29-cent truck charge from Martins Creek to Philadelphia becomes $1.53. As a result of the milling of 138 pounds of wheat, a product called mill feed is produced, as well as flour. The former is readily marketable whether produced at Martins Creek or at protestant's midwestern mills.

The only customer specifically named as being lost to ConAgra is the Food Fair bakery in Philadelphia. Protestant served this account by rail from Des Moines, but about 3 months prior to the hearing the customer ceased to purchase from protestant explaining that it was obtaining flour from Martins Creek. As of the hearing, the witness had no knowledge as to the baker's source of supply. Protestant has never sought to sell truck delivered flour in the Philadelphia area. At Frederick, Md., about 140 miles from Philadelphia the company operates a bulk flour terminal which receives shipments by rail. The cost of unloading, servicing, and storing the flour is 11.16 cents per 100 pounds. The cost of distribution by private truck is 13.04 cents per 100 pounds. To compete with ConAgra at Philadelphia a plant similar to the Frederick operation would have to be acquired.

On cross-examination protestant acknowledged that a miller at Buffalo who purchases wheat at Twin Cities and ships it to Buffalo for grinding into flour and then on to Philadelphia for truck delivery would incur a total cost of $1.31 comprised of the Buffalo unit train rate of 43 cents, a 5-cent handling charge at Buffalo, a 58-cent rail rate from Buffalo to Philadelphia, and a 25-cent bulk truck delivery charge in Philadelphia. The 43-cent factor in the above equation could perhaps be overstated by about 2 cents in the event the outbound shipment could be balanced by inbound billing. Despite its competitive disadvantage in relation to the mill at Buffalo, protestant has been able to hold a share of the eastern market.

Ross Industries, Inc., insofar as the issues in this proceeding are concerned, operates flour mills at Newton, Wellington, and Wichita, Kans., with daily grinding capacities of 7,000, 7,000, and 19,000 hundredweight, respectively. Most of the wheat ground at these mills is the hard winter variety produced in Kansas and Nebraska. To achieve the proper blends of bakery flour a small quantity of hard spring wheat from the Dakotas and Minnesota is mixed with the hard winter variety. Protestant has no facilities in the East and relies exclusively on long-haul rail service, including Penn Central, to move flour to the eastern market. Between 15 and 25 percent of flour production moves to points in Pennsylvania, New York, and New Jersey lying within the area ConAgra will solicit out of Martins Creek.

Many customer accounts in the East, including those on rail sidings, prefer delivery by motor vehicle. ConAgra, which relies almost exclusively on motor carriage, has a substantial advantage. To compete for this traffic protestant will be forced to move the railcar to a siding close to the customer and then arrange to have the flour transferred to a motor vehicle for subsequent movement to the customer. Protestant shows that the cost of transferring flour at Norristown from railcar to truck is the same as shown by protestant Peavey. In addition, it shows that a well-known motor common carrier of bulk commodities publishes a tariff of charges which range from 26.5 cents, for trips of up to 50 miles, to 49.5 cents for distances of from 131 to 140 miles. If protestant wishes to compete it will be forced to assume the cost of truck delivery. It had no documents showing the volume of traffic in 1973 which moved to the Norristown terminal or the Brooklyn Eastern District Terminal for transfer to motor vehicles, but it appears that most shipments to the Philadelphia and New York City areas moved direct to bakers equipped to receive flour by rail.

Protestant points out that even under existing rates and charges ConAgra has been able to divert business. Sometime about July or August 1973, a bakery account at Easton, Pa., was lost. Subsequently the account was regained, but the witness was not certain whether his company was still serving the customer. The sale of flour is very competitive and differences of as little as a quarter of a cent may swing a sale. If the proposed 72.25-cent rate is approved ConAgra will be in an even better competitive position.

Normally hard winter wheat of the type grown in the area tributary to protestants mills is used, along with hard spring wheat, in the production of flour intended for the baking industry. One of the reasons for this practice is that the hard winter wheats are usually less expensive. Today, however, because of the huge export demand, the hard spring wheats are cheaper. Protestant believes that upon a return to normal marketing conditions ConAgra will find it profitable to purchase hard winter wheat on the Omaha market. The normal route of movement from Omaha to Martins Creek is over Chicago and the present charge is a combination proportional rate of 44 cents to Chicago and 81 cents beyond. However, if the proposed rate is approved, ConAgra would have the option of moving wheat from Omaha to Twin Cities at a rate of 36 cents and the assailed rate of 72.25 cents beyond to Martins Creek for a through charge of $1.0825 or 16.75 cents under the $1.15 charge over Chicago.

Protestant and other midwestern mills, including ADM, rely upon Penn Central and other eastern railroads to reach the eastern flour market. They fear that approval of the proposed rates will cause the railroads to lose a portion of the flour traffic heretofore enjoyed. Any weakening of the eastern railroads will have an adverse effect on protestants' ability to sell in the eastern market. No study has been made to determine the net revenue realized by the railroads in handling flour, but in view of the vigorous solicitation by rival carriers, including Penn Central and respondent Erie, the witness is of the view that the traffic is profitable. On the assumption that the 6,000 hundredweight of flour produced at Martins Creek will displace an equivalent volume produced by protestant, the eastern carriers would lose a maximum of six cars of flour each day. Protestant recognizes that with the decline in the movement of flour there will be an increase in shipments of wheat, but this will be to the benefit of only respondent Erie and even as to that carrier the revenue will be less than would be realized by handling an equal quantity of flour.

Though protestant objects to the low level of the proposed rate, it doubts that respondents will be able to obtain all of ConAgra's business. The average truck charge from Buffalo to Martins Creek is said to be 35 cents, or 5 cents less than the 40-cent rate published by Erie and Penn Central. Based on his own experience the witness believes ConAgra will make substantial use of the truck service. Thus during the navigation season the proposed 72.25-cent rate plus the 2-cent charge for the movement from the Martins Creek B plant to the A plant produces a total charge of 74.25 cents. In contrast, the combination of a cross-lake charge of 25 cents, an elevator charge of 5 cents, and a 35-cent truck charge produces a total cost of 65 cents. During the season of closed navigation the proposed 83-cent rate plus the 2-cent intraplant charge aggregates a total cost of 90 cents. In comparison the combination of the Buffalo unit train rate of 43 cents, the elevator charge of 5 cents, and 35-cent motor charge produces a total of 83 cents. Protestant believes the aforementioned 9.25- and 7-cent advantages will be so attractive that respondents will not obtain all the shipper's traffic. When questioned as to how Penn Central and other eastern carriers would be harmed by approval of the proposed rates in light of the attractiveness of the alternative transportation available to ConAgra, protestant explained that there is a limit to the amount of wheat which can be handled by motor carriage.

Protestant flour mills' cost expert based his cost study on application of Rail Form A to the 1971 operations of respondent Erie. Costs were shown separately for railroad-owned cars and shipper-owned cars and were developed for the Buffalo to Martins Creek run and the unit train movement from Chicago to Martins Creek. The study shows that for the Buffalo to Martins Creek movement the variable cost per 100 pounds was 16.5 cents in railroad cars and 14.4 cents in shipper cars, producing a revenue contribution of 23.5 and 25.6 cents, respectively. The unit train movement at the 72.25-cent rate level, taking into account the latest revisions in the contemplated operation of the unit train, shows a variable cost of 28 cents in railroad cars and 29.4

cents in shipper equipment, which produces revenue contributions of 19 and 17.6 cents, respectively. On the assumption that 85 percent of the traffic would move at the 72.25-cent rate and the balance at the 88-cent rate the revenue contributions are 20.5 and 19.1 cents in railroad- and shipper-owned cars, respectively. The reduction in the revenue contribution under the proposed rates, as compared with the Buffalo to Martins Creek rate will range from $42,700 to $114,100 depending upon whether the traffic moves in railroad or shipper cars and whether the 68 percent of the traffic which respondents can reasonably expect to handle will all move at the 72.25-cent rate or whether the movement will be on the basis of the 85-25-percent split referred to above.

Appendixes C and D show in detail the procedure used in preparing the study and the contribution to constant costs and profit of the Buffalo to Martins Creek rate compared to Erie's Chicago to Martins Creek division of the proposed rates.

### PROTESTANTS—CITIES AND PORTS

The Buffalo Area Chamber of Commerce opposes the proposed rates as detrimental to the Buffalo mills as well as the vessels and port interests which depend upon cross-lake transportation of wheat. The Chamber feels that ConAgra's present daily production of 6,000 hundredweights plus the contemplated 4,000 hundredweight increase in the near future, and the planned construction of a 5,000 hundredweight durum plant will collectively have an adverse effect on the ability of the Buffalo mills to sell their product. ConAgra serves the same east coast market as does Buffalo, and there is bound to be some diversion with deleterious effects on Buffalo and its citizens. Approval of the rate adjustment will accelerate the trend toward opening mills east of Buffalo and is likened to the opening of the St. Lawrence Seaway which resulted in Buffalo losing a substantial volume of wheat which was transshipped for movement to the North Atlantic ports.

The Chamber points out that the 6,000 hundredweights of flour produced by ConAgra is the equivalent of 10 lake vessel loads of wheat. When the flour mill production increases by 4,000 hundredweight and when the durum mill comes on stream they will require the equivalent of an additional 7 and 8.5 lake vessel loads of grain. Thus approval of the proposed rates will mean the possible loss of 25.5 lake vessel visits to Buffalo. ConAgra's wheat requirements both now and in the future will inevitably cause the Buffalo mills to need less wheat and this slackening of demand could possibly eliminate another 25 to 30 vessel arrivals.

The Marine Division of the Niagara Frontier Transportation Authority, an agency of the State of New York, opposes the proposed rate adjustment on the ground that it will adversely affect the marine operations of the port of Buffalo. The latter ranks 7th in size of the 54 ports of the Great Lakes, and 28th in size of the 40 main seaports of the United States.

In 1972, grain shipments from United States and Canadian lake ports totaled 965,123,848 bushels. In the same year the domestic volume was 60,479,001 bushels, all of which originated at Twin Ports. Of the latter figure, 58,354,766 bushels, or 96.5 percent, terminated at Buffalo. In former years, Buffalo served as a transshipment point for huge quantities of export grain but with the opening of the St. Lawrence Seaway this business was lost. Grain receipts at Buffalo reached an all time low of 54,261,253 bushels in 1971.

Buffalo has the largest flour milling capacity in the Nation and nearby all of the grain milled at Buffalo moves via lake vessel from Twin Ports. The mills sell their product in the eastern markets centered in New York, New Jersey, and eastern Pennsylvania. If the proposed rates are approved they may well have a disastrous effect on the Buffalo milling and marine industries. The ecological advantages of water commerce are well known, and anything which inhibits this mode of service is contrary to the public interest.

The present single-car rate from Twin Cities and Twin Ports to Martins Creek is $1.05. The proposed rates will cause wheat to be diverted from Buffalo. Respondent Erie does not propose unit train service on wheat or flour from Buffalo to the New York City and Philadelphia markets, does not propose to reduce the present single-car rate on flour of 58 cents from Buffalo to these same points, and does not hold out to lake vessels serving Buffalo rates on level comparable to those under consideration. Erie does not serve Philadelphia and the witness has no knowledge as to whether there is a demand for unit train service to these two markets. It is said to be unlawful for respondent to transport wheat from Twin Ports to Martins Creek at only 14.25 cents more than the single-car rate on flour from Buffalo to New York-Philadelphia. Protestant however sees nothing amiss with the Buffalo unit train rate which is 15 cents less than the 58-cent rate on flour from Buffalo to New York-Philadelphia.

Criticism is directed to the 15.75-cent higher charge respondents propose to apply during the season of closed navigation in comparison with that which is to be applied during the season of open navigation. This is said to be unfair in that it takes advantage of a happenstance over which the competitive mode has no control.

The Board of Trade of the city of Chicago opposes the adjustment because Chicago is an intermediate point between the origins and Martins Creek, but the proposed rates are not applicable on traffic which may originate at Chicago. The Board of Trade includes among its members persons involved in the buying, selling, storage, and milling of grain. Within the switching district there are two wheat mills and various grain storage elevators with an aggregate capacity of almost 65 million bushels. Collectively the elevators are equipped to receive and ship grain by rail, truck, barge, lake vessel, or ocean vessel. Four elevators with a storage capacity of 4.6 million bushels are capable of loading unit trains comprising 50 or more covered hopper cars. There are several shippers within the Chicago switching district which can and do load unit trains of 50 or more covered hopper cars.

Protestant points out that respondent Erie maintains from Chicago to Martins Creek at the Ex Parte No. 299 level a flat rate of 98 cents and a proportioned rate of 81 cents. In contrast, the proposed rates which are designated as proportional rates are 72.25 cents during the open season of navigation on the Great Lakes and 88 cents during the closed season. Thus Chicago, which is an intermediate point on the route over which the proposed rates apply, takes a higher rate during the season of open navigation than that which applies from the named more distant points. Such treatment is said to violate section 4 of the act.

The Seaway Port Authority of Duluth and the International Association of Great Lakes Ports oppose the considered adjustment because it will cause further diversion of the lake vessel movement of wheat.

Duluth-Superior or Twin Ports has a grain storage capacity of more than 77 million bushels. The domestic movement of wheat from this area during the period 1969-73, was 83,979,000, 74,771,000, 69,950,000, 89,850,000, and 85,184,000 bushels, respectively. Comparison of domestic shipments of wheat from Duluth-Superior, the rail and lake vessel share of this traffic, and the volume destined to Buffalo are shown for the 14 years from 1960 through 1973. For the latter year rail shipments to all destinations comprised 49.9 percent of the total domestic movement, while lake carriers handled 50.1 percent of the total. During the same year Buffalo received 48.6 percent of the total domestic movement.

For the period 1960 through 1963, the rail portion did not exceed 22 percent, whereas, the lake vessel share was not less than 78.6 percent. From 1964 through 1972 the rail share ranged from a low of 29.8 percent in 1965 to 49.6 percent in 1972, while the lake vessel slice varied from 70.2 in 1965 to 50.4 percent in 1972. The rail traffic was destined to all points, whereas, most of the lake vessel shipments moved to Buffalo.

Protestants submit that the existing Buffalo unit train rate does not in any way justify approval of the considered adjustment. With respect to the former, the railroads were meeting water competition from Duluth to Buffalo, whereas, here the destination is Martins Creek which is 341 inland miles southeast of Buffalo. The earlier adjustment met water competition, but the instant proposal will meet water-rail or water-truck competition.

Protestants are critical of the Soo's showing that for the years 1969-73, lake carriers moved on the average of 65 million bushels of grain from Duluth-Superior. They submit that the average figure is 61.7 million bushels and that on this basis the 6.7 million bushels moved under the Buffalo unit train rate comprises almost 11 percent of the total lake vessel movement. The record shows, however, that the Buffalo unit train moved an average of 5.7 million bushels over the 5-year period and that on this basis the railroads handled about 9.2 percent of the total amount moved by lake vessel.

It is pointed out that the Buffalo unit train rate was established primarily to move wheat. During the aforesaid 5-year period Buffalo received an average of 44,330,000 bushels by lake vessel. Assuming that the rail average of 5.7 million bushels comprised wheat, then the rails have been handling about 12.9 percent of the Buffalo wheat traffic. The 3,500,000 bushels projected to move to Martins Creek is 8 percent of the domestic lake vessel movement to Buffalo.

Respondents' justification for the 72.25-cent rate is the cost of alternative transportation comprised of a lake vessel charge of 26.67 cents from Duluth to Buffalo, an elevation charge of 5 cents at Buffalo, and the rail rate of 40 cents from Buffalo to Martins Creek. However, they have extended the same rate to Twin Cities, though it is clear that the alternative transportation charges referred to above do not apply on movements from this point. The proportional rate of 15 cents from Twin Cities to Twin Ports should be added to the 72.25-cent rate in order to arrive at the alternative cost from Twin Cities. The through charge of 87.25 cents is only slightly less than the 88-cent proposed rate sought to be applied during the closed season of navigation.

Protestants submit that the rate comparison referred to by respondent Soo does not justify treating Twin Cities the same as Twin Ports. They opine that if the propriety of the proposed rates is to be determined by the costs of alternative transportation, then the 88-cent rate should be applied the year round from Twin Cities. Mention is made of the fact that other railroads are less than enthusiastic about the Buffalo unit train rate. Burlington Northern never participated in the unit train rate from Twin Ports to Buffalo. The Milwaukee Road allowed its participation in the rate to expire in 1970. The Chicago and North Western publishes a unit train rate from Duluth-Superior, but its rate is 4 cents higher than the Soo's charge. It sought to allow the rate to expire on September 15, 1973, but the proposal was not approved by the Western Trunk Line Committee.

### PROTESTANTS—CARRIERS

Lake Carriers' Association comprises 15 managements which own or operate 172 United States vessels registered to engage in commerce upon the Great Lakes. The vessels of the members constitute more than 98 percent of the United States, Great

Lakes registered vessels and they handle 95 percent of the domestic commerce on the Great Lakes.

In 1972, grain shipments from United States and Canadian lake ports totaled 965,123,848 bushels. In the same year, United States lake vessels handled 60,479,001 bushels through operation of the cabotage laws. This traffic originated at Twin Ports and 96.5 percent or 58,354,766 bushels moved to Buffalo. Nearly all the grain milled at Buffalo moves in lake vessels from Twin Ports.

Protestant submits that the Commission should take into account more than whether the proposed rates are compensatory. For example, bulk cargo vessels operating on the Great Lakes transport 495 ton-miles of cargo on 1 gallon of fuel oil. Most of the vessels use coal for fuel. Another consideration is the car shortage. It takes a covered hopper car longer to go from Twin Ports to Martins Creek than it does to travel from Buffalo to the same point. If respondents are truly concerned with the car shortage they should establish rates which allow grain to move in lake vessels thereby freeing covered hopper cars for other service.

Protestant disputes ConAgra's contention that it is not possible for Buffalo elevators to simultaneously unload a lake vessel and load railcars. For example, Standard Elevator at Buffalo is able to provide simultaneous service to the lake vessel and railcars. This elevator is served by Erie, whereas, most of the other elevators in Buffalo are served by the Buffalo Creek Railroad, partly owned by Erie. If there are deficiencies in switching service at Buffalo it is respondent Erie's fault.

Penn Central Transportation Company objects to the proposed rates on several grounds. First is the question of divisions as between the respondents. The Buffalo unit train rate of 43 cents is divided 40 percent or 17.2 cents to Soo and 60 percent or 25.8 cents to Erie, whereas, the proposed 72.25-cent rate to Martins Creek gives Soo 35 percent or about 25.28 cents while Erie obtains 65 percent or 46.97 cents. Though statistically each participant will increase its revenue, the arrangement accords Soo a disproportionate increase gained at the expense of respondent Erie. Thus Soo will receive 8.08 cents or 50 percent more per 100 pounds than it receives when providing the exact same service (Twin Ports or Twin Cities to Chicago), as it does when participating in a unit train move to Buffalo. Respondent Erie's obligations are greater under the Martins Creek rate, both in terms of mileage and the operational problem encountered on the final 14-mile segment of the trip between Portland and Martins Creek. Though the respondents agree that Soo will supply the cars there is no tariff rule setting forth this obligation. In the event Erie should furnish equipment its transportation obligations would in this respect be no different from those incurred under the Buffalo unit train movement. When a carrier assumes added operational responsibilities it should generate revenues in the same proportion as the added burdens.

Protestant fears that the divisional arrangement will establish a pattern inimical to the interests of the eastern roads. Reference is made to an agreement between Chicago and North Western and several eastern lines, including Penn Central and Erie, in connection with a 66-cent export rate on wheat in unit trains of 1,470 tons from Twin Ports and Twin Cities to Albany, N.Y., Philadelphia, Pa., Baltimore, Md., and Norfolk, Va., providing that the Chicago and North Western was to receive 44.6 percent from points of origin to Chicago, while the eastern lines for the haul from Chicago to the aforementioned ports would receive 55.4 percent. The agreement covered a 5-month period ending June 15, 1972. The record does not disclose whether it is currently in effect. Since the January 13, 1972, effective date of the division sheet, the Commission has approved Ex Parte Nos. 281, 295, 299, and 301 general increases. About the same costs are incurred in moving a unit train whether for the export or domestic markets.

Penn Central and Erie serve Chicago and Buffalo and participate in substantial tonnages of grain moving to Buffalo as well as flour moving out of the latter point. Protestant believes the proposed rates are too low in the sense that they will enable ConAgra to attract customers thus hurting those mills which rely on Penn Central and Erie to bring wheat to Buffalo and flour from Buffalo to the eastern market. It concedes that the proposed rate of 72.25 cents is close to the level of the alternative costs available to ConAgra, but it emphasizes that rail service is more rapid and the cost to the consignee of owning wheat is, therefore, less. Furthermore, vessel charges upon which the 72.25-cent rate is based will be higher in 1974.

Penn Central published a rate on wheat from Buffalo to Martins Creek effective October 31, 1973, at a level competitive with the Erie's five-car rate of 40 cents. Protestant does not serve ConAgra's plant, but it has a reciprocal switching arrangement with Erie thereby permitting it to reach the plantsite. So far as the record shows, it has not been tendered traffic.

Soo and Penn Central have participated in the Buffalo unit train rate from its inception and both have supplied covered hopper cars for the movement. Soo may dedicate up to 277 covered hopper cars to unit train service and the commitment to ConAgra accounts for close to one-sixth of the authorization. It is feared that Soo will, if the rate is approved, find it more advantageous to furnish covered hopper cars for the Martins Creek train rather than for the Buffalo unit train, and this will have an inhibiting effect on the amount of wheat which will hereafter move to Buffalo, or will require a larger commitment from Penn Central or respondent Erie. Penn Central's witness conceded that probably all of the ConAgra movement would take place during the season of open navigation, while in contrast the Buffalo unit train moves during the season of closed navigation.

Penn Central's Director—Market Planning and Research, Mr. Olson, had discussions with ConAgra's General Traffic Manager, Mr. Stone, concerning the movement of wheat to Martins Creek, and the availability of Penn Central covered hoppers cars from origins in Minnesota and Buffalo. The discussions took place over a 30-month period during which time there were 3 or 4 meetings and 20 to 30 telephone conversations. Witness Olson was not aware prior to the hearing of the letter of December 4, 1973, sent by protestant's District Sales Manager (Mr. Ryan) in Omaha to ConAgra stating that covered hoppers were in short supply at Buffalo. Had ConAgra contacted the witness, Mr. Olson, the cars would have been assigned because they would be used in a dedicated back and forth movement which is financially rewarding traffic. The witness discussed the letter with Mr. Ryan and the latter stated he thought ConAgra's letter was a general inquiry. Mr. Ryan further stated to the witness that he discussed ConAgra's request with the person in protestant's Philadelphia office who has day-to-day responsibility for assignment of covered hopper cars. However, no order was placed assigning cars to ConAgra. Witness Olson is surprised that Mr. Stone did not contact him about the need for cars. Mr. Ryan conveyed to witness Olson his belief that the ConAgra request was a maneuver calculated to draw the response which was forthcoming.

Penn Central's Manager—Service Planning, Mr. Wulfhorst, is responsible for the planning and programming of unit trains. It is the practice of the witness and his staff to make a complete study of the feasibility and the manner in which the unit train will be operated. The study covers such matters as the route of movement, crew requirements, number of cars in the train, and the number of engines required to move the trains. In the witness' experience actual operation conforms substantially to the way the train was conceived to operate in the planning stages. There may be rescheduling of the movement of the train or addition or deletion of power units, but such changes constitute only minor modifications of the way the train was planned to operate.

As of the hearing, protestant was operating two so-called classic unit trains. One is a 100-car coal train from a mine in central Pennsylvania to an electric generating station at Berwick, Pa. The other is a 125-car coal train from Blacksville W. Va., to an electric generating station at Monroe, Mich. Both trains move intact from origin to destination and back to origin. The road crew that brings the train to the point of destination remains with the train till it reaches the site of actual placement. Each car of the train is unloaded consecutively. Switching time is the interval from arrival of the train at the entrance to the consignee's property to the time the caboose had passed into the plantsite. Protestant operates a unit train of coal to an electric generating station at Martins Creek. Because the cars are company owned the witness does not consider this to be a classic unit train. However, in the manner in which the train is operated it could be treated as a classic unit train. Protestant strives to confine unit train movements to its lines.

In the witness' opinion the proposed service cannot be considered as a classic unit train because of the manner in which Erie plans to operate the train and the limitations of the shippers plantsite. The train will be brought to Portland, Pa., about 14 miles short of destination and there broken up into two 25-car segments. The road crew which enters duty status at Scranton will handle the train only to Portland at which point a local crew will take over. The Scranton crew will then move light from Portland to Scranton with one of the 2,500-horsepower engines. Switching time will begin with arrival of the loaded train at Portland and ends when the 50 cars are brought together again for the return journey. The speed limit in yards and on industrial tracks is 15 miles per hour. Protestant speculates that, because of the condition of the track, curvatures, or grade crossing, there could be speed limits on the 14-mile segment between Portland and Martins Creek. ConAgra's plant is not sufficiently large to permit actual placement of a 50-car train. The size of the yard permits only 25 cars to be placed at one time, with the result that the remaining 25 cars must be held in the status of constructive placement.

Protestant raises several other questions as to the feasibility of the operation as it has been planned by respondent Erie. It notes that the two 3,600-horsepower engines will be replaced at Scranton and three 2,500-horsepower units will be substituted. Whether the substituted units will be sufficient to move the train from Scranton to Portland is dependent on the ruling grade which the train must traverse and the gross trailing tons of the train. At Portland there is a similar question whether two 2,500-horsepower locomotives will provide sufficient power to move the 25-car cut to Martins Creek. The record is silent as to ruling grade and the gross trailing weight of the train and protestant is unable to reach any firm conclusions on the questions raised.

Respondent Erie will not be able to move a cut of two locomotives and four hopper cars from the south end of track 1 of the shippers' yard onto track 4. The stub-end track at the south end of the yard is not sufficiently long to accomodate the two locomotives and four cars and at the same time clear the switch which will enable the cut to move to track 4. The only solution is to switch two cars at a time, but this will entail at least one additional switch not contemplated by the testimony of respondent's manager of transportation. It would be possible to make the switch if the four-car cut had only one locomotive. However, a machinist is required to uncouple the extra locomotive and such personnel are not oridinarily part of a local switch crew.

At the time the witness visited the ConAgra facility in late December 1973 or early January 1974, there were several boxcars on the track connecting the stub-end switch referred to above to track 4. The cars were being unloaded. Of course the four cars of the unit train intended for unloading at track 4 could not be placed while such an activity was in progress. Protestant also points out that the distance from the pits on tracks 1 and 2 where the railcars are unloaded, to the southern entrance to the plant is

540 feet. A jumbo covered hopper car is 57 or 58 feet in length, and at some point in the unloading process the first 1 or 2 cars of the 11-car cut on track 2 or the 10-car cut on track 1 would block the entrance. The blockage could be avoided by removing the last tow cars of each cut and placing them on their respective tracks south of the entrance, but this would involve two switches not contemplated in respondent's plan of operation.

Jumbo covered hopper cars unload through gates on the underside of the car. Usually a covered hopper car will have three gates. The wheat is discharged through the gate into a pit and as the shipper's pit can accept the contents of one gate at a time, the car must be moved forward over the pit at least three times or as many times as the car has gates. As the cars are unloaded and move north from the pit there may be a blockage of the alpha entrance to the plantsite.

It may not be assumed that, when the last car of the second cut of 25 cars is unloaded, a crew will be at the Martins Creek yard ready to remove the cars from the shipper's plant. It is possible the crew may have to travel from Portland or Bangor to Martins Creek to bring out the second cut of 25 cars. Again this is said not to be consistent with the way a classic unit train should be operated. Protestant believes that the Erie crew from Croxton Yard would go on duty at that point and that the 12 hours' duty time would commence at that time. It believes that the automobile would be the most expeditious way to travel from Croxton to Bangor.

### REBUTTAL—RESPONDENTS

Soo's Manager of Pricing and Market Development testified in rebuttal.

Carriers participating in joint-line movements negotiate the division of the through charge which each is to receive. There are a number of formulae upon which the split may be based, but the agreements are always characterized by hard bargaining. In negotiating the division of the considered rate, respondent did not accord any consideration to the financial posture of respondent Erie. It believes, however, that the allocation of 35 percent to it and 65 percent to Erie is eminently fair to the latter. Reference is made to a 1,000-ton multicar export proportional rate on grain from Twin Cities and Twin Ports to Baltimore, New York, Philadelphia, Norfolk, and Albany, first published in 1966, under which Soo receives 44.6 percent and the eastern connecting carriers, including Penn Central, realize 55.4 percent. A similar rate to New Orleans, La., is divided between the originating line and the connecting carrier in the same proportions. The position a carrier takes on the percentage of the through charge to which it is entitled is determined by the level of the charge to be divided and on the volume of traffic anticipated from the through charge. The volume of traffic handled pursuant to the above-described rates is not known.

The Soo-Erie division arrangement was negotiated during the summer of 1972, shortly prior to publication of the earlier Martins Creek rate involved in I. and S. Docket No. 8784. Both carriers had cost studies during the negotiations. Though that rate proposal was never approved and was voluntarily canceled, there was no change in the division when the rates under investigation were published. Soo would like to receive the same division as realized from the Buffalo unit train rate. The 40-60 percent division of revenue in connection with that rate was negotiated in 1963 and even that is believed by Soo to be too low.

Unit train movements require considerable planning, and it is customary for the carriers and shippers to discuss the anticipated movements in advance of the time the traffic is tendered. The amount of time required to assemble a unit train of 50 cars could vary from 3 days to 3 weeks, dependent on a host of varying circumstances.

The witness had no knowledge as to whether Pillsbury had requested to be furnished 17 unit trains of which 6 were to originate at Twin Cities. Neither could he confirm or deny that Soo had declined to provide service out of Twin Cities. However, the witness believes that had Pillsbury sought to modify its request of August 28, 1973, so as to be provided a unit train in November or December 1973, or January 1974, he would have learned of the matter. The witness acknowledged that Soo declined to furnish a train to be assembled September 10, 1973, but he had no knowledge concerning difficulties testified to by the witnesses for Peavey and Standard Milling in obtaining equipment from respondent.

Soo concedes that during all of 1973, and perhaps even before that, the demand for covered hopper cars exceeded the supply. The demand came from both country origins and the terminal elevators. The movement of all grains from country elevators during the period from 1969 through 1973, was 1,837,195 tons, 2,002,420 tons, 1,861,572 tons, 2,883,504 tons, and 4,940,873 tons, respectively. The increase in 1973 over the prior year was about 71 percent. Wheat comprises about 50 percent of total grain originations. January 1974 originations are running at about the same level as in the prior year, and the witness expects volume to continue at a high level during the first 6 months of the year.

During the fall of 1973, respondent came to realize that there would be sufficient traffic during the closed season of navigation to require 125 unit trains from Twin Cities and Twin Ports to Buffalo. This volume was much greater than that which moved in prior years. In contrast, most of the Martins Creek traffic is expected to move, in the summer or during the period of open navigation on the Great Lakes. During the 1974 season of closed navigation respondent operated five unit trains from Twin Ports to Buffalo. The trains comprise Soo, Erie, and Penn Central cars, but the witness had no knowledge as to the number of cars supplied by the various roads, though it is conceded that a large number of cars are supplied by Erie and Penn Central.

The Buffalo unit train rate is published as a proportional rate and authorizes transit privileges. As previously shown shippers who moved wheat from Twin Ports or Twin Cities to Buffalo in January 1974 when the published rate was 43 cents might actually pay less than the published rate if they are able to show they received a corresponding quantity of wheat from the country elevators which originated at a time when the Buffalo rate was less than 43 cents. On the basis of his examination of the waybills of about 25 of the 30 unit train movements made up during the period from the fall of 1973 up to the date of the hearing from Twin Cities and Twin Ports to Buffalo, the going rate was 41 cents. The proposed rate is also a proportiional rate with transit privileges, but unlike the tariff governing application of the Buffalo unit train rate, it is provided that outbound shipments shall move at the rate in effect at the time of departure from Twin Cities or Twin Ports rather than the rate level in effect at the time the shipment departed the country origin.

On January 1, 1974, Soo requested a transit settlement of the Twin Cities and Twin Ports elevators which it serves. This requires the elevator to compare the quantity of grain on hand with the inbound transit billing and to cancel the oldest excess transit billing. The effect of the settlement is to take away from the owner of the grain the right which it otherwise could have to ship grain outbound at the lowest rate in effect from the transit point at the time the grain originated at the country origin. The result is that a higher rate applies on the outbound movement. The high cost of holding grain in inventory encourages the owner to move the grain out so as to avoid the cost of ownership.

### REBUTTAL—SUPPORTING SHIPPER

Regarding the fears of protestant Ross Industries that the proposed 72.25-cent rate will enable ConAgra to ship hard winter wheat from Omaha via Twin Cities and then on to Martins Creek at a lower through charge than Ross must pay over the Chicago gateway, ConAgra points out that the Martins Creek mill has been operating 8 months during which period there have been no shipments of hard winter wheat and the company has no intention of departing from this practice. The limited requirements for hard winter flour at Martins Creek are supplied from the company mills in Nebraska. This traffic moves by rail under a through charge of $1.25, the same as protestant states it pays. Protestant's comment that wheat could be moved from Omaha via Twin Cities to Martins Creek at a through charge of $1.0825 cents is correct, but when it is remembered that 138 pounds of wheat is required to produce 100 pounds of flour, the laid down cost of such a movement would be $1.49 or 24 cents higher than the cost of moving 100 pounds of flour from one of the Nebraska mills. Out of 138 pounds of wheat, the miller realizes 100 pounds of flour, 30 pounds of mill feed and 8 pounds of a low-grade product called clear flour. There is a market for mill feed produced at Martins Creek but the price received for this product does not justify long-distance movement. The witness had no knowledge as to the price received for mill feed. Protestant's fear that ConAgra has taken over the Schaibles Bakery account in Easton, Pa., is ill founded. The customer uses 16,000 hundredweight a month and since June 1973 about 20,000 hundredweight or 15 percent of the company's requirements has been received from Martins Creek. ConAgra is not presently serving the customer though it will continue to solicit the account.

Concerning protestant Peavey's experience that the cost of renting air-slide cars at Buffalo is 6.07 cents a hundredweight, ConAgra shows that its cost is 1.70 cents. The lower ConAgra figure is based on the fact that its cost was spread over all leased air-slide cars and 297 similar cars of railroad ownership assigned to the company whereas, protestant's cost related only to its leased car expense at Buffalo. Criticism is also leveled at protestant's statement that its actual 1973 experience in using cross-lake vessel service from Twin Ports to Buffalo was 17.20 cents a bushel or 28.67 cents per 100 pounds. This is believed too high in that it includes elements for insurance, overtime wages, and demurrage charges. ConAgra carriers insurance regardless of how its grain moves. Grain moving in rail service is protected by the provisions of section 20(11) of the act and thus the shipper's coverage need only be used if the rail carrier fails to make the loss good. In contrast, lake vessels are not subject to the liability provisions of section 20(11) of the act. Overtime wages are incurred and paid not only in unloading lake vessels but also railcars. ConAgra submits that a portion of protestant's 28.67-cent cost includes elements of expense also borne by it.

Concerning Pillsbury's complaint about losing the Raymond Bakery account at Waterbury, Conn., ConAgra has moved two truckloads to this account up to the time of hearing with two more planned for the near future. All are experimental shipments for the purpose of learning the exact blend of flour the customer desires. Future shipments to this account will be by rail in air-slide cars from the company's Nebraska mills. The flour will be transferred from the railcar to a motortruck at Waterbury for delivery to the bakery. The exact same trucker will be used as was used by Pillsbury when it served the customer. The motor carrier charges will be paid by the customer.

Regarding protestant ADM's complaint that the Northern Division of Food Fair Bakery in Philadelphia has been lost, ConAgra shows that it moved three truckloads to the account during September 1973. These were emergency shipments for the purpose of filling depleted stocks caused by the delay of rail deliveries. The witness does not know who is presently serving this account but he acknowledges that his company is serving the Amorosos Bakery at Philadelphia which is located on track.

The Martins Creek mill has been in operation 8 months but despite protestant's claims of lost business, the record shows that they are operating on the average about 6 days a week. During September 1973, production at Buffalo was 13 percent greater than in the preceding year, and its share of the market went from 9.9 to 11.2 percent in the same period. Production in the New York mills in August 1973 was 4 percent less than in the same month of 1972. Production of the Kansas and Minnesota mills declined 1 percent in September 1973 as compared with the prior year. However, production in Kansas in August 1973 was 8 percent below the prior year, while the mills in Minnesota experienced a decline of 5 percent over the prior year.

Favored treatment by respondents in the allocation of freight cars is not expected and ConAgra does not consider that respondent Soo has made a commitment to supply cars, but only that it has indicated a willingness to cooperate. The shipper leases 150 covered hopper cars with an additional 100 units to be received in the near future and is ready and willing to use this equipment in the contemplated unit train to Martins Creek. The provisions of Car Service Order No. 1120 are temporary. Though equipment continues to be in short supply it is expected that the situation will ease in the latter part of 1974.

ConAgra insists, despite the testimony of protestant Pillsbury, that rail service out of Buffalo is unsatisfactory. For example, in October 1973, there were a number of instances where 12 days elapsed from the time a car arrived at Buffalo to the date of reshipment to Martins Creek. The total elapsed time from date of shipment at Buffalo to the next loading of the same car was as long as 20 days of which 8 days were consumed in actual transit from Buffalo to Martins Creek and return. During November the total elapsed time was as high as 24 days.

ConAgra's witness Stone and his staff have had conversations with Penn Central's witness Olson but the principal subject of the discussions was unit train rates on wheat from Buffalo or Chicago to Martins Creek. Undoubtedly car supply was discussed but only in the context of how many cars Penn Central could furnish for the comtemplated unit train. Penn Central's witness never stated that he should be contacted in the event of a car supply problem.

Witness Stone and members of his staff speak at regular intervals with Penn Central's District Sales Manager in Omaha, Mr. Ryan, regarding availability of airslide and covered hopper cars throughout the system. Mr. Ryan has made many cars available and has never indicated that the witness should speak with protestant's representative in Philadelphia who has day-to-day responsibility for assignment of covered hoppers. As noted previously, witness Stone telephoned Mr. Ryan in late November seeking assistance in alleviating a problem at Buffalo. When advised by Penn Central that delays of 4 to 6 weeks could be experienced at Buffalo, witness Stone replied "we will take cars when you have them available."

ConAgra disputes the testimony of protestant's cost expert as to the percentage of wheat which will move at the 72.25-cent rate as contrasted with that which will move at the higher 88-cent rate. Because of the high cost of owning wheat the shipper would expect to have on hand at Martins Creek, when the season of closed navigation commences about December 15, a 9-week supply. As the nonnavigation season lasts about 15 weeks, there will be a need to move at the 88-cent rate enough wheat for about 6 weeks production. On the basis of a 5-day work week about 414,000 bushels, or the contents of three unit trains, will be required. Thus ConAgra submits that there are sound grounds for believing that respondents are correct in believing that there will be at least three unit trains at the 88-cent rate. If the mill should operate a 6-day week, as the Buffalo mills are doing, one additional unit train would be required. It is not anticipated that the mill will operate more than a 6-day week.

Concerning Penn Central witness Wulfhorst's observation that placement of the four unit train cars on track 4 could be impeded by the presence of boxcars on the connecting track between the switch and track 4, the witness speculates that the boxcars referred to were loaded with oats for the equine warehouse. One or two carloads of this traffic are received each week and the likelihood of them impeding the placement of the unit train cars is remote. The free time on this traffic is 48 hours, whereas, the unit train must be unloaded in 36 hours. Thus should both consignments arrive at the same time there would be ample opportunity to unload the oats after the unit train had been unloaded. However, it is conceivable that 25 cars of the unit train and the shipment of oats could move into the plant at the same time, but ConAgra does not believe that this would create any problem for respondent Erie or itself.

It is not disputed that at sometime during the unloading process on tracks 1 and 2 the southernmost entrance to the plant would be blocked, but this should not present any problems. First, the blockage would occur only for an hour or so each time a unit train is unloaded. ConAgra is able to unload 3 cars each hour for the first 4 hours, while the remaining 13 cars would be unloaded at the rate of 2 cars an hour. Though the record is not entirely clear, it appears that the string of 10 cars on track 2 and 11 cars on track 1, as they are unloaded, move from south to north across the unloading pit. Thus it would seem possible that in 2 hours a total of six cars could be unloaded and moved to a point north of the unloading pit with the result that the southern entrance to the plant would not be blocked. However, during the time this entrance was blocked the Alpha or north entrance would be open. If there should be a problem the 10- and 11-car cuts could be divided and 2 cars placed on the southside of the entrance, but it seems clear that if this is done Erie would have to perform the work.

ConAgra agrees with witness Wulfhorst's comment that four covered hopper cars and two locomotives could not move in a single switching operation onto track 4 for unloading. The practice would be to have three cars clear the switch and then the remaining car switched separately. Upon completion of the switch all four cars would be pushed to the unloading pit. The shipper recognizes that this is a departure from Erie's contemplated plan, and should it require too much time, then only 3 cars need be placed on track 4, while the remaining 22 cars could be unloaded from tracks 1 and 2.

## APPENDIX C

In developing costs for the movements from Buffalo and Chicago to Martins Creek, protestants have adjusted the respondent's Rail Form A costs for the following differences which they believe result in more appropriate cost data.

A. Costs for movements from Buffalo to Martins Creek were adjusted for the following differences:

1. *Switching costs at Martins Creek.*—Whereas, respondent included system average switching expenses based on an average switching time of 28.7 minutes per loaded car, protestants based the switching expense on an average switching time of 12 minutes per car which they believe is more than an ample allowance and is far more realistic than a system average of 28.7 minutes.

2. *Line-haul costs.*—Whereas, respondent has calculated its line-haul costs on average train costs, protestants, based on respondent's description of the actual movement involved, have based line-haul costs on through train costs from Buffalo to Portland and on-way train costs from Portland to Martins Creek.

3. *Intertrain handling.*—While respondent has included inter- intratrain switching expense on a car-mile basis, protestants have substituted the cost for one intertrain handling on the basis of respondent's description of the actual operation involved.

B. Costs for movements from Chicago to Martins Creek were adjusted for the following differences:

1. *Cost per gross ton-mile for the Scranton-Martins Creek segment.*—Respondent has developed costs for this movement assuming that a 2-unit pusher would assist the train from Scranton to Elmhurst, Pa., and that at Portland the train will be separated into 2 cuts of 25 cars each to be handled separately from Portland to Martins Creek, Pa. Based on respondent's description of the operation, protestants have assumed that four locomotive units will be employed between Scranton and Portland and that between Portland and Martins Creek the equivalent of 5.9 units will be employed. These costs also include the additional crews necessary to handle the traffic, as described by respondent.

2. *Tare weight.*—While respondent employed a tare weight of 28.1 tons per car, protestants employed a tare weight of 28.75 tons, which reflects an equal weighting of Soo Line aluminum and steel cars.

3. *Intratrain switching.*—While respondent's cost data exclude any allowance for intratrain switching, protestants have included an intratrain switching expense at Portland where the train is divided into two separate cuts. Since this type of switching is expected to be less costly than an actual intertrain switch, protestants based the cost on 25 percent of the Erie's system average cost per car.

4. *Car-hire costs.*—Whereas, respondent has included car-hire costs based on 6 days turnaround time, protestants have utilized 7 days based on the characteristics of the through train operation as described by respondent.

5. *Net load.*—Whereas, respondent has used a net load of 102 tons per car, protestants have utilized what they consider a conservative average, i.e., 100 tons.

6. *Deadheading expense.*—Protestants have included 45 cents per hundredweight to cover the return deadheading locomotive expense incurred in order to handle split unit trains to Martins Creek.

7. *Update factors.*—While respondent utilized a price index of 1.1935 in updating the costs to a January 1, 1974, level, protestants have utilized a factor of 1.215 developed by respondent, which excludes the car-hire expense.

Protestants have developed cost/revenue comparisons at two rate levels. The first level assumes that the rate of 72.25 cents per hundredweight (in effect from April 1 to December 14) is applied to 100 percent of the traffic Erie can reasonably expect to handle. The second rate level assumed a weighted average of 74.61 cents per hundredweight and is applied to the traffic Erie can reasonably expect to handle. The weighted average rate was determined on the basis of respondent's statement that the rate of 72.25 cents would be applied to 85 percent of the traffic and the rate of 88 cents per hundredweight (in effect from December 15 to March 31) would be applied to the remaining 15 percent of the traffic. The adjustments described above for the present and proposed movements were applied to the cost data developed by respondent. Appendix D is a summary of the comparisons as developed by protestant.

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## APPENDIX D

*Comparison of Erie-Lackawanna Railway's portion of proposed rate with rail costs as developed by protestants applicable to movement of wheat in covered hopper cars—Buffalo, N.Y., to Martins Creek, Pa., versus Chicago, Ill., to Martins Creek, Pa.*

(DEVELOPED FROM PROTESTANTS' BRIEF FILED MARCH 25, 1974, PAGES 27-31 AND EXHIBIT NO. 31, PAGES 16-22)

| Item | Buffalo to Martins Creek | | Chicago to Martins Creek | | | |
|---|---|---|---|---|---|---|
| | Erie cars (1) | Shipper cars (2) | Soo Line cars (3) | Shipper cars (4) | Soo Line cars (5) | Shipper cars (6) |
| 1. Erie revenue per hundredweight --------cents------ | 40.0 | 40.0 | [1]47.0 | 47.0 | [2]48.5 | 48.5 |
| 2. Erie variable cost per hundredweight --------do------ | 16.5 | 14.4 | 28.0 | 29.4 | 28.0 | 29.4 |
| 3. Revenue per hundredweight in excess of variable cost --------do------ | 23.5 | 25.6 | 19.0 | 17.6 | 20.5 | 19.1 |
| 4. Hundredweight carried per year -------- | 1,428,000 | 1,428,000 | 1,428,000 | 1,428,000 | 1,428,000 | 1,428,000 |
| 5. Erie annual contribution to constant costs and profit-------- | $335,580 | $365,568 | $271,320 | $251,328 | $292,740 | $272,748 |
| 6. Fully allocated cost per hundredweight--------cents------ | 23.1 | 21.0 | 39.8 | 41.2 | 39.8 | 41.2 |
| 7. Ratio-revenue to variable cost--------percent---- | 242 | 278 | 168 | 160 | 173 | 165 |
| 8. Ratio-revenue to fully allocated cost--------do------ | 173 | 190 | 118 | 114 | 122 | 118 |

[1] Rate in effect April 1 to December 14 projected to apply to 1,428,000 hundredweight.

[2] Weighted average of rates of 72.25 cents applied to 85 percent of traffic and 88.0 cents applied to 15 percent of traffic.

SERVICE DATE

AUG 15 1974

# ORDER

## INTERSTATE COMMERCE COMMISSION

## INVESTIGATION AND SUSPENSION DOCKET NO. 8899

## UNIT TRAIN RATES ON WHEAT, MINN. & WISC., TO MARTINS CREEK, PA.

IN THE MATTER OF A PETITION FOR LEAVE TO INTERVENE IN SUPPORT OF PROTESTANTS

PRESENT: Virginia Mae Brown, Commissioner, to whom this matter has assigned for action thereon.

It appearing, That by petition filed August 9, 1974, the State of New York seeks to intervene in this proceeding in support of protestants and requests a 90-day extension of time in which to file petitions for reconsideration so that the interests of various New York agencies and parties may be consolidated and all these interests represented by the State;

It further appearing, That respondents, by telegraphed reply filed August 13, 1974, object to intervention by the State of New York unless similar relief is granted for intervenors in support of respondents and argue that a 90-day extension is clearly unwarranted; and that, by letter reply, filed August 13, 1974, Conagra, an intervenor in support of respondents does not object to intervention and consolidation, but asserts that a 90-day extension for filing petitions for reconsideration would be severely prejudical to its interests;

Wherefore, and for good cause:

It is ordered, That the State of New York, be, and it is hereby permitted to intervene in support of the protestants, to become a party to this proceeding, and to consolidate the interests of parties presently representing certain New York State interests;

It is further ordered, That the motion for an extension of time in which to file petitions for reconsideration be , and it is hereby, granted in part so as to extend the date for filing said petition until September 18, 1974.

**Dated at Washington, D. C., this 14th day of August, 1974.**

**By the Commission, Commissioner Brown.**

**ROBERT L. OSWALD,**
**Secretary**

**(SEAL)**

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8899

UNIT TRAIN RATES ON WHEAT, MINN. &
WISC., TO MARTINS CREEK, PA.

# PETITION OF LAKE CARRIERS' ASSOCIATION FOR RECONSIDERATION

Scott H. Elder
2700 Terminal Tower
Cleveland, Ohio 44113

Attorney for Protestant

Johnson, Branand & Jaeger

Of Counsel.

Due Date: August 17, 1974

Protestant, Lake Carriers' Association, pursuant to Rule 101, hereby petitions Division 2 of the Commission for reconsideration concerning the report and order of the Commission served in the above captioned case under date of July 18, 1974.

The hearing in this cause was concluded February 5, 1974. Division 2 entered its report and order June 18, 1974, but such report and order was not served until July 18, 1974.

Protestant Lake Carriers' Association seeks reconsideration on the grounds that there has been a material change of circumstances since conclusion of the hearings on February 5, 1974.

Protestant Lake Carriers' Association accepts respondents premise that, in setting the level of the proposed rates, respondents do not intend to go any lower than necessary to meet the alternative transportation costs available to the shipper. In essence, as long as the alternative costs to the shipper all-rail vs. lake-rail are equivalent, the lake carrier industry has no objection.

The industry does, however, of necessity, take exception to certain conclusions reached by Division 2 in its report and order served July 18, 1974. Specifically, Division 2 criticizes the evidence of Lake Carriers' Association on page 26 by saying that the Commission may not substitute assumption for hard evidence, yet Division 2, on page 4 of its report and order, concludes that there are certain escalations built into the proposed all-rail rate which conceivably could approximate the amount of the 1974 charges for wheat moving in lake vessels.

We submit that the arguments advanced by protestant Lake Carriers' Association were not based on assumptions but upon irrefutable logic. By the same token, the reasoning of Division 2 is even less defendable by virtue of the fact that it emphasizes that the parity which the respondents purportedly seek is only conceivable due to authorized general increases.

Thus the fundamental rule of evidence between possibility and probability is very much in point. In final analysis, what Division 2 has said is that protestant Lake Carriers' Association has not established that it is probable that lake vessels have the inherent advantage, yet it has based its decision on the premise that it is possible or conceivable that authorized general increases will place the proposed rates of respondents on parity with the lake-rail movement.

But be all this as it may, the fact remains that there has been a material change of circumstances which requires reconsideration by Division 2 of the Commission.

Since conclusion of the hearings on February 5, 1974, vessel wage costs have increased substantially. On June 21, 1974, agreement was reached between certain Great Lakes vessel companies and the United Steelworkers of America, Local 5000. On August 4, 1974, agreement was reached between certain vessel companies and Marine Engineers Beneficial Association. Additionally, the cost of fuel, towing, supplies and repairs have all increased, producing the following results:

Wages, licensed and unlicensed, increased over 20%
No. 6 Bunker C fuel increased 62%
Diesel fuel increased 54%
Towing increased 11%
Supplies increased 10%
Repairs increased 10%

Consequently, the charge for moving wheat in lake vessels from Duluth-Superior to Buffalo, New York can be expected to reach a level of at least 24¢ per bushel or the equivalent of 40¢ CWT. Add to this the cost of elevating the grain at Buffalo of 5¢ CWT and the 40¢ five-car rate from Buffalo to Martins Creek, makes a total lake-rail rate of 85¢ CWT. It is not conceivable that general increases will make a similar adjustment in the all-rail rate.

If the respondents are sincere in their assertion that they do not intend to go any lower than necessary to meet the alternative transportation costs available to the shipper, it would seem that the all-rail unit train rate from the twin ports to Martins Creek should not be pegged any lower than 88¢, the same as the rate from the twin cities.

For these reasons, we believe Division 2 should reconsider its report and order served July 18, 1974 in light of the important economic developments which have occurred subsequent to conclusion of the hearing on February 5, 1974.

Respectfully submitted,

Scott H Elder

Scott H. Elder
Counsel for
Lake Carriers' Association

BEFORE THE

INTERSTATE COMMERCE COMMISSION

| | | |
|---|---|---|
| UNIT TRAIN RATES ON WHEAT, | ) | |
| | ) | I&S DOCKET |
| MINNESOTA AND WISCONSIN TO | ) | |
| | ) | NO. 8899 |
| MARTIN'S CREEK, PENNSYLVANIA | ) | |

## PETITION FOR LEAVE TO INTERVENE

James E. Sykes
General Attorney
Chicago, Rock Island and
Pacific Railroad Company
139 West Van Buren Street
Chicago, Illinois 60605

Dated: August 16, 1974

BEFORE THE

INTERSTATE COMMERCE COMMISSION

UNIT TRAIN RATES ON WHEAT, ) I&S DOCKET
MINNESOTA AND WISCONSIN TO )
MARTIN'S CREEK, PENNSYLVANIA ) NO. 8899

## PETITION FOR LEAVE TO INTERVENE

Petitioner, Chicago, Rock Island and Pacific Railroad Company, hereby seeks leave to intervene and become a party, pursuant to Rule 72, Interstate Commerce Commission General Rules of Practice, in the captioned proceeding and as grounds for intervention states:

I. Petitioner, a Delaware corporation, is a Class I common carrier by rail subject to the Interstate Commerce Act. Its corporate headquarters is located in the LaSalle Street Station, 139 West Van Buren Street, Chicago, Illinois 60605.

II. Petitioner operates a railroad system extending into thirteen states, including a rail route between Minneapolis and St. Paul, Minnesota and Chicago, Illinois.

III. Petitioner's interest in the captioned proceeding first became apparent upon the issue by Division 2 of the report and order of the Commission and in particular, the finding that the proposed 72.25 cent rate from Minneapolis and St. Paul and Minnesota Transfer to Martin's Creek, Pennsylvania was unlawful to the extent that the rate from those points was less that 88 cents. That conclusion was predicated on the need to include the local 15 cent rate from the Twin Cities to the twin ports of Duluth and Superior, Minnesota, in the rate from the Twin Cities.

IV. This unexpected conclusion places the petitioner at a distinct disadvantage in competing with other rail carriers operating out of the Upper Midwest to the Chicago Gateway. By serving the Twin Cities and not the Twin Ports, under the rationale of the decision of the Commission this petitioner will be unable to establish rates that would be competitive to those established for comparable movements from the Twin Ports which it does not serve.

V. There is evidence in the record of this case that there is a trend to the construction of flour mills in the eastern market area which will be supplied with wheat moving out of the Upper Midwest. Rail movement of such wheat from the Upper Midwest depends on the establishment of rates competitive with charges by alternative modes of transportation, particularly vessels operating on the Great Lakes. Under the rationale of the Commission's decision it would be impossible for a rail carrier serving only the Twin Cities to establish rates that would be competitive with rates established by a rail carrier serving the Twin Ports. Consequently, this petitioner would be effectively excluded from offering competitive rates for unit grain trains moving from the Upper Midwest to eastern points.

VI. The growing market for such transportation makes it imperative that the petitioner be allowed to establish competitive rates from the Twin Cities and attract a share of the traffic. Because the rates under consideration are proportional, the traffic at stake is drawn from a wide geographic area and could produce significant revenues for this petitioner.

VII. Petitioner's interest in this proceeding is in support of the respondents' for reconsideration of the Commission's decision to the extent herein described.

WHEREFORE, Chicago, Rock Island and Pacific Railroad Company hereby prays for leave to intervene in this proceeding with the right to have notice of any action taken therein and to file a petition for reconsideration of the Commission's decision.

Respectfully submitted,

CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY

BY
James E. Sykes

Dated: August 16, 1974

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

UNIT TRAIN RATES ON WHEAT, ) I&S DOCKET
)
MINNESOTA AND WISCONSIN TO ) NO. 8899
)
MARTIN'S CREEK, PENNSYLVANIA )

## INTERVENOR'S PETITION FOR RECONSIDERATION

James E. Sykes
General Attorney
Chicago, Rock Island and
Pacific Railroad Company
139 West Van Buren Street
Chicago, Illinois 60605

Dated: September 9, 1974

BEFORE THE

INTERSTATE COMMERCE COMMISSION

UNIT TRAIN RATES ON WHEAT, ) I&S DOCKET
MINNESOTA AND WISCONSIN TO )
MARTIN'S CREEK, PENNSYLVANIA ) NO. 8899

# INTERVENOR'S PETITION FOR RECONSIDERATION

## I

## Introduction

Now comes the Intervenor, Chicago, Rock Island and Pacific Railroad Company, hereinafter referred to as Intervenor, to petition for reconsideration of the report and order by Division 2 of the Commission in I&S Docket No. 8899, served July 18, 1974, as that decision relates to the unlawfulness of the equivalent rates from the Twin Cities (Minneapolis, St. Paul and Minnesota Transfer, Minnesota) and the Twin Ports (Duluth and Superior, Minnesota). That conclusion was predicated on a two-paragraph statement in the report and order appearing on the bottom of Page 29 and the top of Page 30 thereof. The thrust of that statement is that the water-related rate (Twin Ports) cannot be applied at an inland point (Twin Cities) because it would disregard the transportation advantages of the point having access to water transportation. For reasons hereinafter stated it is submitted that the aforementioned conclusion is wholly inconsistent with prior decisions of the Commission related to comparable situations.

The potential effect of this conclusion on this Intervenor, if allowed to stand, is obvious. Intervenor's system includes a route from the Twin Cities to the Chicago gateway. However, Intervenor does not serve the Twin Ports or any other point in the Upper Midwest which has access to water transportation. Consequently, the rationale of the conclusion under consideration would preclude the Intervenor from establishing rates for comparable movements from the Twin Cities which would be competitive with rail rates from the Twin Ports. The effect would be to deprive the Intervenor of any share of such traffic with no discernible concomitant benefit: the record being devoid of any evidence whatsoever of harm to any party arising from equivalent rates. It is difficult to conceive how the National Transportation Policy is served by arbitrarily eroding the potential market of an already hard pressed rail carrier.

## II

## Argument

The Commission's conclusion is inconsistent with its prior findings and conclusions in comparable circumstances. The subject of Pig Iron from New York Points to Detroit, 296 ICC 747 (1955) was a rate, as in the case under consideration, designed to meet water competition. In its report the Commission stated:

> "(t)he protestants contend that there is no justification for the establishment of so low a rate from points other than Buffalo which are not located on navigable water, pointing out that the cost of a rail haul to Buffalo and additional handling expenses are entailed in the movement from such points to Detroit. While there is no evidence of any movement of pig iron to Detroit from points adjacent

> to Buffalo, there is a producer of pig iron at Niagra Falls, and it is reasonable to assume that shipments may be made from that point to Detroit. These adjacent points have long been accorded the Buffalo rate. Where reduced rates have been established from certain points to meet water competition, carriers serving other producing points may be authorized to meet the market competition thus created. Soda Ash to Georgetown, S. C., 269 ICC 475, 478." Supra 752.

With the Commission's judicial notice of the correspondence of rates on grain products between the Twin Cities and the Twin Ports the decision in the aforementioned case seems to be on all fours with the issue at hand.

The observation of the Commission in Soda Ash to Georgetown, S. C., 269 ICC 475, 478 (1947) seems to be significant in this context: "Where, as here, reduced rates have been established from certain points to meet water competition, carriers serving other producing points may be authorized, subject to proper restrictions, to meet the market competition thus created." There is nothing in the record of the instant case to suggest a lack of market competition between the Twin Cities and the Twin Ports. Thus the denial of the relief sought in the cited case can be distinguished from the situation now before the Commission.

For the approval by the Commission of the maintenance of interport (market) competition see Sugar to Ohio River Crossings, 308 ICC 167, 179 (1959). While the thrust of the Petitioner's interest in this matter relates to the disadvantage it would experience in competing with rail carriers serving the Twin Ports, the Commission has found carrier competition to be an aspect of market competition. Sulphur, Canadian Origins to East St. Louis, Illinois, 326 ICC 288, 302, 303 (1966). Consequently, the respondents' interest in protecting its competitive position in the Twin Cities relative to the Twin Ports demonstrates the market competition between the former inland point and the latter water competitive point. It is submitted that the conclusion by the Commission is contrary to the need of the Intervenor, serving only the Twin Cities, to meet market competition created by the reduced rates established to meet water competition, to wit a "special case" Oil Country Iron of Steel Pipe, Midwest to Oklahoma and Texas, 326 ICC 511, 523 (1966). On meeting market competition also see American Sugar Refining Company and Ahnapee & W. Ry. Co., 322 ICC 717, 721 (1964) and Wine, Pacific Coast to Western, Southwest and Central States, 321 ICC 683, 711 (1964).

Two cases decided by the Commission this decade demonstrate that it has not abandoned the concept expressed in the decisions already discussed. In Portland Freight Traffic Association v. Northern Pacific RR, 337 ICC 826, 831 (1970) the Commission observed:

> "Complainants allege that defendants violate Section 3 of the act by equalizing the Puget Sound Port disadvantage of not having barge service available from the Upper Columbia river ports. However, while it is not within our province to require rates which would overcome the natural disadvantages of location, the carriers may voluntarily establish such rates if not otherwise unlawful. Cf. Public Service Comm. v. Southern Pac. Co., 211 ICC 567 and Iron Ore from Eastern Ports to C.F.A. Points, 291 ICC 526, 552, and 553, and 314 ICC 149."

Significant to the role of the Commission in assessing the justification for rate equivalency between the Twin Cities and the Twin Ports is the statement in Wheat & Wheat Flour, Westbound, 337 ICC 858, 879-880 (1951):

> "We do not view our functions under the rate making powers bestowed upon us by the Interstate Commerce Act as permitting us, directly and affirmatively, either to promote new markets from distressed industry or to shield existing ones from outside competition. It is beyond our limited jurisdiction to save, protect, or enhance commercial ore industrial economic interest as such. Although our action may well affect such interest, our consideration is confined to the factors relating principally to transportation circumstances and the standards we must apply are transportation standards and not general economic welfare criteria. (Citations omitted) If anything, under our private enterprise system, competition is generally supposed to be given free rein, except where the law clearly curbs or curtails it because of an overriding public interest. Accordingly, we have accorded here little weight to the assertions of the parties concerning the alleged general economic importance of the respective groups of millers. In that respect we do not intend to favor either group, but remain neutral."

The weight of these precedents to the instant proceeding is enhanced by the absence of any evidence in the record of harm to any party arising from the establishment of equivalent rates from the Twin Cities and Twin Ports. Indeed, to allow the Commission decision to stand would harm this Intervenor without any justification whatsoever. This Intervenor's competitive struggle is already sufficiently rigorous without imposing further arbitrary impediments to its survival.

## III

## Conclusion

By the decisions heretofore discussed, the Commission has clearly and uniformly enunciated its views on the issue under consideration. The context of the issue in this proceeding cannot reasonably be distinguished from the grounds of the Commission's decisions in that line of cases.

In the absence of some compelling interest there is no reason for the Commission to depart from its historical disposition of this question. The record does not disclose any reason, compelling or otherwise, for such a departure. On the contrary, this Intervenor has advanced an urgent reason why adherence to the Commission's own precedents would serve the interest of preserving Intervenor's position in the Twin Cities' market. Naturally, that interest corresponds to the interest of rail shippers located in the same market.

WHEREFORE, Intervenor respectfully requests the Commission, Division 2, to reverse that portion of its June 18, 1974, Order finding the navigation season unit train rate from the Twin Cities to Martin's Creek, Pennsylvania, to unlawful and in all other respects to affirm said Order.

Respectfully submitted,

CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY

By ______________________
James E. Sykes

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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I&S DOCKET NO. 8899

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# UNIT TRAIN RATES ON WHEAT, MINNESOTA AND WISCONSIN TO MARTINS CREEK, PA.

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## RESPONDENTS' PETITION FOR RECONSIDERATION

---

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Due Date: September 30, 1974

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

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I&S DOCKET NO. 8899

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# UNIT TRAIN RATES ON WHEAT, MINNESOTA AND WISCONSIN TO MARTINS CREEK, PA.

---

# RESPONDENTS' PETITION FOR RECONSIDERATION

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## I.

## INTRODUCTION

Involved in this proceeding are proportional unit train rates ("proposed" rates) on wheat applicable from the Twin Ports (Duluth-Superior) and Twin Cities (Minneapolis-St. Paul) to Martins Creek, Pa. The wheat to be handled under the proposed rates is originally gathered at country elevators located in the Upper Midwest grain country and moved by rail to either the Twin Cities or the Twin Ports under existing levels of flat rates and, subsequently, moved in unit train service under the proposed proportional rate schedule.

By definition, proportional rates are merely portions of the total charges assessed for transportation performed over through routes. They are "in the nature of divisions of through rates which may vary depending upon the origin or the destination of the traffic. . .." (Refund Provisions, Lake Cargo Co., 299 ICC 659, 662) (1957). (Emphasis supplied). In this case the proposed rates provide for routing over, and storage in transit at, either the Twin Ports or the Twin Cities.

In a comprehensive, well-reasoned decision, the Commission, Division 2, unanimously found the proposed rates from the Twin Ports and the non-navigation season (December 15 through March 31) proposed rate from the Twin Cities to be lawful in all respects. A majority of Division 2, however, found the navigation season rate (April 1 through December 14) from the Twin Cities to Martins Creek to be unlawful. It devoted only two paragraphs of its lengthy opinion to this subject, citing no case authority and leaving unclear the specific nature of the unlawfulness; i.e., did it violate Section 1(5), 3(1), 15(a), or the National Transportation Policy? *

As will be shown in the Argument to follow there is ample Commission and judicial authority supporting the lawfulness of the proposed navigation season proportional unit train rate involving routing over the Twin Cities and no such authority, we believe, to the contrary. The

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* Actually, protestants' briefs were extremely vague as to the exact nature of the alleged unlawfulness of the Twin Cities navigation-season rate and respondents, unfortunately, failed to give this matter adequate attention in their brief. That oversight will be rectified in this petition.

Commission's ultimate approval of the entire Martins Creek unit train rate publication will foster competition and prevent preference or prejudice to particular origins or carriers. It will comport with all sanctions set forth in the Interstate Commerce Act and will contribute to an improved national transportation policy.

## II.

## DESCRIPTION OF PROPOSED RATES AND PROCEDURAL HISTORY

The proposed unit train rates which were published by the Erie Lackawana Railroad Company (Erie) and the Soo Line Railroad Company (Soo Line) name the Twin Cities and the Twin Ports as points of origin and Martins Creek, Pennsylvania, as the sole point of destination. The rates were published at the behest of the supporting shipper herein, ConAgra, Inc.

The protested rates are subject to a minimum weight limitation of 190,000 pounds per car, an aggregate minimum weight of 5,000 tons per movement (train) and a minimum aggregate of three consecutive train movements per shipment. Normal terminal and transfer services, such as weighing, inspection, diversion or reconsignment will not apply in connection with this rate. In lieu of standard demurrage provisions, the unit train movements are subject to 24 hours free time at origin and 36 hours free time at destination. Beyond this free time a special detention charge of $475.00 per train will be assessed at origin for each 24 hours or fraction thereof, and a charge of $9.50 per car will be assessed at destination for each 24 hours or faction thereof.

The level of the proposed rate as originally published during the period of open navigation on the Great Lakes (April 1 - December 14) was 72.25 cents per cwt. During the period of closed navigation (December 15 - March 31) the rate level was 88 cents per cwt.

Pursuant to Special Permission Number 74-1051, the proposed rates have been made subject to a modified destination Rule 27 provision. The same permission waives the provisions of Tariff Circular 20 Rules 4(i) and 7 insofar as Items 130 and 132 of Soo Line Tariff 543-B, ICC 7837 are concerned.

Appendix 4 attached to Exhibit No. 1 compares the salient features of the protested rate publication and Soo Line Freight Tariff 526-I, I. C. C. No. 7755, a unit train grain tariff naming rates on wheat and other small grains moving from the identical origins named in the protested tariff to Buffalo, New York. The protested tariff publication was modeled, in large part, upon the Buffalo unit train grain tariff which the Commission found to be lawful in Wheat, in Multiple Car Shipments, Minnesota and Wisconsin to Buffalo, New York, I. C. C. Docket No. 34381. However, certain adaptations of the Buffalo tariff were made, primarily at the insistence of the respondents. Thus, for example, the Buffalo unit train tariff does not require a shipper to book three consecutive trains per "shipment", as does the protested publication.

While the proposed rates, as was also the case with respect to the Buffalo unit train grain rate, are designed primarily to attract to respondents a very limited volume of wheat which can and does move over the Great Lakes via the Twin Ports to Buffalo, both of these rates are also made applicable from the Twin Cities as well as Twin Port elevators, in order to maintain historical market competitive relationships between these two markets.

The Twin Cities origins were included in the Buffalo unit train publication at the specific request of the Buffalo millers most of whom have elevators capable of loading unit trains at both the Twin Ports and the Twin Cities (See Ex. 26, App. A and B).

The proposed rates were published on September 28, 1973 as Soo Line Freight Tariff 543-B, I. C. C. 7837, with a November 1, 1973 effective date. Following the filing of Suspension Petitions, as previously indicated, the Commission's Suspension and Fourth Section Board found that the proposed rates should be permitted to take effect without investigation. Subsequently, the proposed rates were suspended to and including May 31, 1974 by Division 2 and an investigation into their lawfulness was instituted.

As noted in the Commission decision at page 2, respondents increased the 72.25 cent per cwt. rate to 78.25 cents on June 1, 1974. Subsequently, this rate was also made subject to Ex Parte 305-A. Thus, the present navigation season rate level is 89.25 cents per cwt. As noted by the Commission, clearly this increase lessens the impact of some of the protestants' objections" (Commission decision,page 2). In this connection, it is noted that the August 15, 1974 Petition for Reconsideration filed by Lake Carrier Association states, at page 4:

> "If the respondents are sincere in their assertion that they do not intend to go any lower than necessary to meet the alternative transportation costs available to the shipper, it would seem that the all-rail unit train rate from the twin ports to Martins Creek should not be pegged any lower than 88 cents, the same as the rate from the twin cities."

The summer rate level recommended by this protestant is 1.25 cents per cwt. lower than the level which became effective on June 12, 1974.

Pursuant to the terms of the Commission's Order of November 20, 1973, this case was handled under special procedures which involved an exchange of verified statements containing the direct evidence of participating parties and an oral hearing to cross examine designated witnesses called for that purpose by opposing parties. The oral hearings, conducted by Judge Richard A. White, commenced at Washington, D.C. on January 28th and were concluded on February 5, 1974.

## III.

## ARGUMENT

### Division 2 Erred in Holding the Navigation-Season Rate From the Twin Cities was Unlawful

Concerning this issue, the Commission's decision states in its entirety:

> "Protestants Seaway Port Authority of Duluth and

> International Association of Great Lakes Ports and the protestant flour mills allege that application of the 72.25 cent rate from Twin Cities and Minnesota Transfer as well as from Twin Ports is preferential to the former and prejudicial to the latter, is unjust and unreasonable and constitutes a destructive competitive practice. Protestants submit that the 72.25 cent rate is designed to meet the alternative transportation cost available to ConAgra of moving wheat from Twin Ports to Buffalo, the elevator cost at Buffalo, and the rail rate beyond to Martins Creek, but they point out that there can be no similar justification for applying the same rate from Twin Cities and Minnesota Transfer about 160 miles inland from Twin Ports. The true alternative cost from Twin Cities would include a factor of 15 cents which is the charge for moving wheat from Twin Cities to Twin Ports. Respondents in reply show that grain rates from most country origins are the same to both Twin Cities and Twin Ports and that the same rates apply from both terminals to both the Gulf and Atlantic ports for export, as well as to points in official territory.
>
> We agree with protestants. Both Twin Cities and Twin Ports are large grain terminal centers and we may properly assume that they are in competition for the outbound movement of wheat. Twin Ports by reason of its location has a transportation advantage in relation to Twin Cities which the proposed 72.25-cent rate ignores. Respondent Soo serves both Twin Cities and Twin Ports and does not show why a water-related rate from Twin Ports should be applied to origins 160 miles inland. We are not persuaded that past practices equating the rates to and from the two markets nor the future possibility of fourth section violations in the event other carriers joint the adjustment constitute sufficient reason for similarity of treatment in this proceeding. A lawful rate from the preferred origins would be 88 cents which is substantially the product of the local 15-cent rate from Twin Cities to Twin Ports and the proposed 72.25-cent rate beyond." (Commission decision, pp. 29-30).

Actually, protestant Buffalo Mills merely allege the Twin Cities inclusion violates Section 1(5) (see Buffalo Mills' brief, p. 61), and the only other protestant raising this issue on brief alleges Twin Cities inclusion "is unjust and unreasonable; constitutes an unfair and destructive practice; is an unlawful dissipation of carrier revenue in violation of Section 1(5) and Section 15a of the Interstate Commerce Act, and contravenes the national transportation policy" (brief of International Association of Great Lakes Ports, et al, p. 4). No Section 3(1) allegation is made on brief by either of these protestants.

### A. Proportional Rates Involved

At the outset, it should be noted that the protested publication, from both origin areas and with respect to both rate levels, establishes proportional rates which, coupled with the applicable gathering (flat) rates from literally hundreds of country stations to the Twin Ports or the Twin Cities, establish the total transportation charges to Martins Creek. As stated by the Commission in Refund, page 2, supra, proportional rates "are in the nature of divisions of through rates which may vary depending upon the origin or destination". Equally important, in the context of this case, it should be noted that the grain gathering rates at the Twin Ports and the Twin Cities, with very few exceptions, have been equalized at least since 1934, by Commission prescription in the Docket Seventeen Thousand, Part VII Proceedings, Grain and Grain Products, 205 ICC 301 (1934).*

Under these circumstances, there is no economic or competitive justification for depriving Twin City shippers of the right to store in transit and ship under the proposed proportional unit train rates, wheat which is gathered from the same country stations and at the same rates as the wheat which will move from the Twin Ports to Martins Creek under the proposed proportional unit train rates.

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* Respondents provided the record with many other examples of grain rate equalization afforded the Twin Ports and Twin Cities to Gulf ports, Atlantic Coast ports and numerous points throughout official territory. (See Ex. No. 1, App. 5). Although they had ample opportunity to do so, protestants produced no examples of non-equalized rates from these origin areas to any point.

### B. Inclusion of Twin City Origins Justified by Market Competition

In its brief discussion of Twin City inclusion in the proposed rates the Commission noted that "[b]oth Twin Cities and Twin Ports are large grain terminal centers and we may properly assume that they are in competition for the outbound movement of wheat". Certainly this assumption is well-grounded and has been recognized by the Commission on numerous occasions. In Minneapolis Traffic Ass'n. & N. W. Ry. Co., 266 ICC 729, 758 (1946), the Commission characterized competition between primary grain markets as follows:

> "The fact that wheat, in a traffic sense, is the most liquid commodity known in transportation, the fierce competition of the primary markets, and the extreme sensitivity of the rate adjustment, combined to distinguish our action as to absorption of switching charges on grain to the markets from that which we might necessarily take as to any other commodity".

In an earlier decision involving the Minneapolis Traffic Ass'n. case, 245 ICC 11 (1941), the Commission had no hesitation in ordering the Twin Cities railroads to cease and desist from refusing to absorb switching charges on grain to the same extent that railroads serving other important grain markets in the Western District absorb them. This refusal to absorb switching charges on grain to the same extent that railroads serving other important grain markets in the Western District absorb them had created a serious imbalance in the prescribed grain structure. The Commission's order in the earlier Minneapolis Traffic Ass'n. case was sustained on judicial review in Northern Pacific Ry. Co. vs. U.P.S., 41 F. Supp. 439, affirmed 316 U.S. 346 (1942).

The Commission and the Courts have recognized that the grain rate structure is sui generis, and must be dealt with accordingly. In upholding the basic structure as prescribed by the Commission, the Supreme Court said, "It is not for us to tinker with so sensitive an organism as the grain rate structure only a minor phase of which is caught in the record before us." Board of Trade vs. U.S., 314 US 534, 548 (1941).

Respondents respectfully submit that in finding the non-navigation season unit train rate from the Twin Cities to Martins Creek to be unlawful the Commission is tinkering with specific grain rates in a manner that can cause great harm to the sensitive competitive relationship presently existing between the Twin City and Twin Ports grain markets and can cause further harm to midwest railroads, including respondent Soo Line.

In essence, the protestants urge the Commission to find the proposed unit train rate unlawful from the Twin Cities because they are located approximately 160 miles from Lake Superior and thus Twin Cities shippers cannot avail themselves of water transportation to Buffalo, New York. The Commission has considered and rejected the identical argument on many occasions. Thus, in a leading case dealing with the subject, Pig Iron from New York Points to Detroit, 296 ICC 747, 752 (1955), the Commission stated:

> "The protestants contend that there is no justification for the establishment of so low a rate from points other than Buffalo which are not located on navigable water,

> pointing out that the cost of a rail haul to Buffalo and additional handling expenses are entailed in the movement from such points to Detroit by water. While there is no evidence of any movement of pig iron to Detroit from points adjacent to Buffalo, there is a producer of pig iron at Niagara Falls, and it is reasonable to assume that shipments may be made from that point to Detroit. These adjacent points have long been accorded the Buffalo rate. Where reduced rates have been established from certain points to meet water competition, carriers serving other producing points may be authorized to meet the market competition thus created". *(Emphasis supplied).

To the same effect, in Soda Ash to Georgetown, S.C. 269 ICC 475, 479 (1947), the Commission stated:

> "Where, as here, reduced rates have been established from certain points to meet water competition, carriers serving other producing points may be authorized, subject to proper restrictions, to meet the market competition thus created".

In American Sugar Refining Co. vs. Ahnapee & W. Ry. Co., 322 ICC 717, 721 (1964), the Commission said in like vein:

> "The record is clear that the assailed rates were established to enable the Western shippers to compete in the Central territory market following the reduction in rates from Eastern points caused by motor carrier competition. Under similar circumstances, we have recognized the right of carriers to meet market competition thus created".

In two more recent cases, the Commission has reaffirmed the long line of decisions illustrated above. In Portland Freight Traffic Ass'n. vs. Northern Pac. Ry., 337 ICC 826, 831 (1970), the Commission stated:

> "Complainants allege that defendants violate section 3 of the act by equalizing the Puget Sound ports disadvantage of not having barge service available from

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* It is noted that a predecessor of protestant Penn Central was a respondent in this case.

> the Upper Columbia River ports. However, while it is not within our province to require rates which would overcome the natural disadvantage of location, the carriers may voluntarily establish such rates if not otherwise unlawful. Cf Public Service Comm. of Nevada vs. Southern Pac. Co., 211 ICC 567, and Iron Ore from Eastern Points to C. F. A. Points, 291 ICC 527, 552, and 553, and 314 ICC 149". (Second emphasis supplied).

Concerning the subject of market competition, the Commission summarized its views in Wheat & Wheat Flour Westbound, 337 ICC 858, 879 (1971), as follows:

> "We do not view out function under the rate making powers bestowed upon us by the Interstate Commerce Act as permitting us, directly and affirmatively, either to promote new markets for a distressed industry or to shield existing ones from outside competition. It is beyond our limited (880) jurisdiction to save, protect, or enhance commercial or industrial economic interests as such. Although our action may well affect such interests, our consideration is confined to factors relating principally to transportation circumstances and the standards we must apply are transportation standards, and not general economic welfare criteria. ( Citations omitted) If anything, under our private enterprise system, competition is generally supposed to be given free rein, except where the law clearly curbs or curtails it because of an overriding public interest. Accordingly, we have accorded here little weight to the assertion of the parties concerning the alleged general economic importance of the respective groupt of millers. In that respect, we do not intend to favor either group, but remain neutral".

In literally scores of decisions, the Commission has authorized the publication of so-called group rates where the identical rate is made applicable from very broad origin territories to even broader destination areas. Thus, for example, the same rate applies on lumber from coastal and inland origins in the Western United States to an area roughly bounded by Gary, Indiana, on the West and the Atlantic Seaboard on the East. These rates were published to meet market competitive situations. Indeed, to a greater or lesser extent, the entire transcontinental rate structure involves this principle. Without it, raw materials produced in the sparcely populated Western regions of the United States could not find markets in the populous Eastern areas of this country. The same economic and competitive principles underlying the transcontinental rate structure are applicable, in a material way, to the case at hand.

Only if the proposed rates become applicable, at both the navigational and non-navigational level, from both the Twin Ports and the Twin Cities, can grain merchandisers at the Twin Cities compete effectively with their Twin Ports counterparts in attempting to sell wheat to ConAgra for delivery to Martins Creek, Pennsylvania. Certainly the protesting Buffalo Mills should not be heard to complain if ConAgra has the benefit of this type of competition. All of said mills have grain elevator facilities located at both the Twin Ports and Twin Cities. Most of those mills supported respondents efforts in the Buffalo unit train case to make that rate applicable from both origin territories and most of said mills have shipped grain under the Buffalo unit train rate from both the Twin Ports and the Twin Cities. While the Buffalo rate was designed to be competitive with lake transportation plus Winter storage charges, the record in this case shows that some unit trains have moved to Buffalo during the open Great Lakes navigation season. (Tr. 1254)

### C. Respondent Soo Line and Other Twin City-Chicago Lines have the Right to Publish the Proposed Rates from Twin City Origins

As noted in the Pig Iron case, supra, "[w]here reduced rates have been established from certain points to meet water competition, carriers serving other producing points may be authorized to meet the market competition thus created." At the present time the Soo Line is the only Midwest railroad joining in publication of the proposed rate. It is conceivable that the other Midwest railroads operating between the Twin Ports and the Twin Cities, on the one hand, and Chicago, on the other, will eventually join in said publication. In such event, the Twin Cities would be intermediate to the Twin Ports and Chicago on the lines of both the Burlington Northern and the Chicago, Milwaukee, St. Paul & Pacific Railroad. Thus, unless Fourth Section relief was obtained from the Commission, the Twin Ports-Martins Creek unit train rate would be available to shippers in the Twin Cities choosing to ship over one of those railroads.

The Chicago, Rock Island and Pacific Railroad Company, which has evinced an interest in this precise issue by its intervention in this case, conducts mainline operations between the Twin Cities and Chicago, but does not serve the Twin Ports area. The Commission's ruling in the Pig Iron case and the others heretofore cited is clearly applicable to the Rock Island and authorizes that carrier to meet the market competition created by establishment of the Twin Ports-Martins Creek unit train rate by publishing the same rate from the Twin Cities.

Although it serves both origin areas, respondent Soo Line also has the right, under the ruling in the Pig Iron case, to exert its geographic advantage in serving both origin areas by making the unit train rate applicable from both origin areas. Inclusion of the Twin Cities origins will enhance the possibility that Martins Creek unit trains will be loaded at elevators physically served by respondent, Soo Line, thus obviating the necessity of paying reciprocal switching charges to another carrier and permitting respondents to achieve better utilization of equipment dedicated to unit train service.

### D. Inclusion of the Twin City Origins will not Result in an Unlawful Dissipation of Carrier Revenues

As shown on page 3 of Exhibit 2, the verified statement of Charles C. Crandall, the Soo Line's main line from Minneapolis to Chicago is approximately 15 miles shorter than its line between Duluth and Chicago. The variable cost incurred by the Soo Line in moving unit trains from Minneapolis to Chicago is .6 cents per cwt. less than that incurred in moving an identical train from Duluth to Chicago. In the case of respondent Erie, of course, the operations and costs involved are identical whether a given unit train originates at the Twin Cities or the Twin Ports. Thus, there is absolutely no merit to the contention of the International Association of Great Lakes Ports, et al, that inclusion of the Twin Cities in the proposed rate will cause a dissipation of carrier revenues. In a modest way it will have the opposite effect. The Commission and all of the parties know full well that no unit train will move from the Twin Cities to Martins Creek during the navigation season if the Twin Cities-Martins Creek unit train rate is 15 cents or more per cwt. higher than the Twin Ports-Martins Creek unit train rate.

To suggest that respondents are unlawfully dissipating revenues by making the same rates applicable from both origins, under these circumstances, is to engage in the sheerest type of sophistry.

## IV.

## CONCLUSION

After careful scrutiny of a voluminous record and the extensive briefs filed by various parties in this proceeding, the Commission, Division 2, correctly concluded that the multilevel unit train rates from the Twin Ports to Martins Creek and the non-navigation season Twin Cities-Martins Creek rate comported in all respects with the provisions of Sections 1(5), 1(6), 3(1), 4(1), 6, 15a(2) and 15a(3) of the Interstate Commerce Act and the National Transportation Policy. Protestants have cited no facts, reasons, or authorities in support of their groundless contentions that publication of the navigation season unit train rate from the Twin Cities to Martins Creek violates any of those provisions.

Respondents have shown herein that inclusion of the Twin Cities will preserve and foster the healthy market competition presently existing between the Twin Cities and Twin Ports terminal grain markets. Indeed, exclusion of the Twin City origin would be highly prejudicial to grain merchandisers located in the Twin Cities and would deprive ConAgra, Inc., the supporting shipper, of the benefits incident to the present competitive climate. Under the rule of the Pig Iron case and many others heretofore cited in this Petition, respondents and other railroads operating in the involved territory clearly have the right to publish the navigation season level unit train rate from the Twin Cities to Martins Creek which a unanimous

Division 2 in this proceeding has correctly found to be lawful from the Twin Ports to Martins Creek.

WHEREFORE, respondents respectfully request the Commission, Division 2, to reverse that portion of its June 18, 1974, Order finding the navigation season unit train rate from the Twin Cities to Martins Creek, Pennsylvania, to be unlawful and in all other respects to affirm said Order.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 1974, I served a copy of the foregoing petition upon all parties hereto by mailing to them a copy of the same, postage prepaid, in accordance with the General Rules of Practice of the Interstate Commerce Commission.

C. Harold Peterson

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# BEFORE THE
# INTERSTATE COMMERCE COMMISSION

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## I&S DOCKET NO. 8899

## UNIT TRAIN RATES ON WHEAT, MINNESOTA AND WISCONSIN TO MARTINS CREEK, PA.

---

## PETITION FOR RECONSIDERATION ON BEHALF OF PROTESTANT BOARD OF TRADE OF THE CITY OF CHICAGO

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BOARD OF TRADE OF THE
CITY OF CHICAGO

Frank E. Polom
Executive Director of Transportation
141 West Jackson Boulevard
Chicago, Illinois 60604

Due Date: October 2, 1974

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| Illinois Cent. R. Co. v. United States 101 F. Supp. 317 | 9 |

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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I&S DOCKET NO. 8899

UNIT TRAIN RATES ON WHEAT, MINNESOTA

AND WISCONSIN TO MARTINS CREEK, PA

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# PETITION FOR RECONSIDERATION ON BEHALF OF PROTESTANT BOARD OF TRADE OF THE CITY OF CHICAGO

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Comes now the Board of Trade of the City of Chicago (CBT), an active protestant in these proceedings, and files this petition for reconsideration of the report and order of the Commission, Division Two, served July 18, 1974. In support of this petition, this protestant respectfully states:

## I

The CBT was active from the outset by filing a protest and petition for the suspension of the Soo Line Tariff 543-B, I.C.C. 7837, naming unit train rates on wheat from Duluth, Minneapolis, St. Paul and Minnesota Transfer, Minnesota, and Superior, Wisconsin, to Martins Creek, Pa. Following the Commission's order instituting an investigation into the lawfulness of the protested rates and suspending the operation of said rates, a verified statement, which went unchallenged by respondents, was submitted and accepted for the record and given identification as Exhibit 12. No request was made by respondents for the cross examination of the CBT witness, nor was any motion made to strike at the hearings held for the purpose of cross examination of witnesses called. Subsequent to the hearings brief was timely filed.

## II

It is necessary, first of all, to put the issues and the finding of Division Two as they relate to Chicago into the proper perspective of this case. Protestant CBT here alleged that the published wheat rates applicable from the Twin Ports/Twin Cities to Martins Creek via Soo Line-Chicago-Erie Lackawanna lacked a tariff provision to provide Chicago, an intermediate station between origins and destinations via the route of movement, an equal opportunity to utilize the depressed rates for the movement of wheat from Chicago to the flour mill at Martins Creek. Respondents' failure to treat Chicago fairly resulted in violations of Sections 1(5), 3(1) and 4(1) of the Interstate Commerce Act.

Briefly, respondents, Soo Line (Soo) and Erie Lackawanna (EL), published unit train rates from the Twin Cities and Twin Ports to Martins Creek via a route [1] through Chicago, Ill., a station directly intermediate between origin and destination. It is also the point of interchange between the Soo Line and Erie Lackawanna. An intermediate rule (destination end) was established in the suspended tariff permitting any facility located at stations on the EL intermediate to destinations the use of the rates; yet no such facility, capable of utilizing these rates, exists at any of these stations. An intermediate rule (origin end) was not published in the tariff which would permit Chicago, a directly intermediate station where elevator facilities do in fact exist and which are capable of loading unit trains, the use and benefit of the depressed published wheat rates at issue in these proceedings.

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[1] See map illustration in Appendix A

Chicago has no multiple car or unit train domestic rates applicable on wheat to Martins Creek. The only legitimate comparision with the rates under investigation are shown in the table below:

| From | | To Martins Creek, Pa. | |
|---|---|---|---|
| Chicago, Ill. | Flat | 98 | |
| Chicago, Ill. | Proportional | 81 | |
| Minneapolis-St. Paul | | 72.25(1) | 88(2) |
| Duluth-Superior | | 72.25(1) | 99(2) |

(1) During open navigation on the Great Lakes
(2) During closed navigation on the Great Lakes

As indicated above and in Appendix "A", the present proportional and flat wheat rates from Chicago to Martins Creek are higher than the suspended rates applicable during open navigation on the Great Lakes.

Respondents defended on the grounds that there is simply no requirement in the Act that an intermediate origin application be afforded every station located between the Twin Ports /Twin Cities origins and Martins Creek where unit train rates are involved, thus nullifying the CBT's allegations of Sections 3(1) and 4(1) of the Act. Division Two, likewise, swept aside these allegations without any supporting justification.

It is here that we take exceptions to the Commission's findings and respectfully request reconsideration. We shall treat the Section 4(1) issue first.

## The Section 4(1) Issue

Division Two relied on a proceeding now before the Commission to cast aside and dispose of this issue; yet, the facts of record clearly indicate a crystal clear example of a violation of Section 4(1) of the Act. By Congressional mandate, the Commission has a duty to administer the law upon the facts of the present record rather than relying upon issues and evidence in another proceeding now pending before it.[2/]

Section 4(1) of the Interstate Commerce Act specifically states that:

> "It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." (Emphasis ours)

The Fourth Section issue was initially raised in the CBT protest and petition for suspension of the tariff schedule. Respondents evaded the issue and treated it lightly by citing cases where the Commission found that in movements under unit train rates, a comparison of like rates and charges must be made to determine whether or not violations of Section 4(1) exist, citing Coal from Illinois, Indiana and Kentucky to Illinois and Indiana, 308 I.C.C. 671 at 677. This is not controlling since the issues raised in that proceeding concerned single car shippers unable to comply with the tariff application for multiple car shipments and as such could

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[2/] Ex Parte No. 304, Amendment of Rule 27 of Tariff Circular No. 20-Intermediate Application of Rates.

not take advantage of the lower multiple rates even though they were made available to them. Here the situation is entirely and completely different. The Commission must take into consideration the governing and compelling facts whether or not a shipper located at the intermediate station posesses all the physical capabilities to handle multiple car or unit train shipments moving on multiple car or unit train rates applicable from the more distant point. In other words, the Commission must consider in light of the evidence submitted for the record whether the intermediate station is entitled to receive equal treatment under the law insofar as the application of the multiple car rates are concerned from the more distant origin station. Chicago is a major grain terminal at which are located grain elevators which posesses the capabilities of handling unit trains composed of 50 or more covered hopper cars. Chicago is directly intermediate via the route of movement from the Twin Cities/Twin Ports to Martins Creek, PA. See map illustration as Appendix A hereto which also shows a comparison of the depressed unit train rates with the rates applicable from Chicago for identical movements. It is our view that the carriers have every obligation under Section 4 of the Act in the publication of multiple car and/or unit train rates to permit any intermediate station (at origin and/or destination end), which can comply with the application of those rates, the freedom to use such rates. In this instant proceeding, respondent carriers have neglected this obligation required by statute to treat Chicago equally. Furthermore, respondents did not seek nor were they granted necessary relief to depart from the requirements of the Fourth Section of the Act. On the other hand, Division Two failed completely to give due consideration to the Section 4 issue and casually brushed it aside with its declaration that the issues raised herein would be given full consideration in Ex Parte 304, supra.

### The Section 3(1) Issue

The application of the published rates from Duluth-Superior to Martins Creek prohibits and precludes Chicago from the use of the depressed rate levels. Chicago lies directly intermediate between origin and destination via the route of movement. Chicago is a major wheat terminal having facilities to market and handle unit train loads (Ex. 12, Page 4). These elevator storage facilities at Chicago receive wheat via rail, water and motor carrier and forward wheat by the same modes of transportatation. The published rates apply via a route operating through Chicago; yet, elevators at Chicago are precluded from the use of the depressed rates, a blatant violation of Section 3(1) of the Act. The suspended 72.25¢ cwt. proportional rate is lower than the present 81¢ cwt.[3] proportional rate applicable from Chicago to Martins Creek. Likewise, the 72.25 and the 88¢ cwt. proportional rates are lower than the flat rate of 98¢ cwt.[3] from Chicago.

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[3] TPO Maurer's C/TN 245-I, I.C.C. C-375, Section 5.

Section 3(1) is specific in its condemnation of any undue or unreasonable preference of, or prejudice to:

> "any particular person......association, locality......transit point......in any respect whatsoever; or to subject any particular person......association, locality......transit point...... or any particular description of traffic to any undue or unreasonable or prejudice or disadvantage in any respect whatsoever."

There is no justification for respondents to arbitrarily deny the elevator operators at Chicago the use of the depressed rate or comparable rates to apply from Chicago. In Board of Trade of the City of Chicago v. Illinois Central Railroad Company, et al. 344 I.C.C. 818, at Pages 830 - 831, the Commission set forth the necessary elements of undue preference and prejudice and establishes the burden of proof as to each element.

> "To support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the defendant carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. Compare Big River Industries, Inc. v. Aberdeen & R.R. Co., 329 I.C.C. 539. The complainant has the burden of proving the presence of the first three factors, and the defendants have the burden of justifying the disparity under "4".

This is the most recent restatement of the law and principles set forth earlier by the Commission in Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5, 10 (1962); State Corp. Comm. of N. Mex. v. Southwestern Motor Frt., 329 I.C.C. 803 (1967). In this instant proceeding, protestant has the burden of proof with respect to the first three conditions; whereas, respondents must sustain the burden relative to (4) above.

The suspended rates and the rules governing their application meet all of the tests of a Section 3(1) violation. It goes without saying that a wide disparity does in fact exist between the suspended rates and those applicable from Chicago for an identical movement. Division Two correctly recognized this disparity at Page 29 of its report and order and concluded the Erie is the source of the alleged preference and prejudice.

With respect to condition (2) injury, actual or potential, the term as used here to identify an essential element of a Section 3(1) violation, does not mean a "measurable detriment" in the sense of business loss, shipments precluded, or specific profits lost as the direct result of the rate disparity. Rather, the term "injury" as it is used in Section 3(1) cases means the detriment which a person suffers in a competitive situation by being placed in a less advantageous position with respect to freight rates and charges than he would be in if his and his competitors' rates were probably related. Given a disparity in rates, the sine qua non of injury is competition. When a protestant has established such competition, after a showing of disparity in rates, he has shown all he needs to show to establish "injury" under Section 3(1).

The ability of the Chicago merchandisers and elevator operators to remain competitive would be completely eroded by the suspended schedule The Commission recognized this in Mayo Shell Corp. v. Baltimore and Ohio Railroad Company, 297 I.C.C. 133 at Page 135, and said:

> The duty of a carrier to give substantially equal treatment to all shippers who are in a position to demand it includes the right to reach competitive markets on relatively equal terms. A rate preference may not be accorded a shipper without a material difference in transportation conditions justifying the preference. An unjustified difference in freight rates that are factors in the competition between shippers constitutes undue prejudice and preference where, as here, the rates are under the effective control of the participating carrier." (Emphasis supplied)

Taking only the fact that a discrimination exists in the rate itself, it can safely be presumed those paying the higher charges would be damaged. This test of injury can be found in Northeast Kentucky Coal Bureau v. Chesapeake & Ohio Ry. Co., 206 I.C.C. 445, 448, (1935). Also, in Chrysler Corp. v. Akron, C. & Y. R. Co., 279 I.C.C. 377, 404 (1950) a case involving a disparity in rates on automobiles, which disparity was not reflected in selling prices, the same test of injury was employed and was sustained on judicial review in Illinois Cent. R. Co. v. United States, 101 F. Supp. 317, 323 (N.D.Ill., 1951), where the court said:

> "Although there may have been no affirmative evidence in terms of "injury" it seems to us that the Commission's ultimate conclusion in this respect was inescapable."

The fact that ConAgra was presently concerned with obtaining its supply of wheat from the Twin Cities/Twin Ports elevators does not deter from the existing possibility of its securing this wheat from other terminals. At Page 533 of the transcript ConAgra's witness testified that the price of grain was a prime consideration in making purchases and these purchases could be made from whatever terminals which were offering grain at the most favorable price. Chicago could very easily be the source of this supply and the evidence of record clearly states Chicago possesses all the capabilities necessary to market wheat in unit train lots and is in position to offer wheat (Ex 12, Pg. 4), but would be precluded from the market because of this wide disparity in the freight rate structure.

The third condition of a Section 3(1) case is that a carrier or group of carriers control the rates and are the source of both the prejudicial and preferential treatment. Here, the Soo Line and Erie Lackawanna Railroad's publication of the suspended tariff schedule 543-B, I.C.C. 7837, with the only route via Chicago, and the restricted application of the rates, fills the requirements of this third condition. This cannot be disputed.

With respect to condition four of a Section 3(1) violation, the burden of proof is upon the respondents to show that the disparity in rates is no greater than is warranted by differences in the circumstances and conditions surrounding the transportation performed under the assailed rates. The record shows this they have not done.

The wheat rates in this proceedings meet all the tests of a Section 3(1) violation and to exclude Chicago from the application of the suspended rates is a classic example of such a violation of the Act.

## CONCLUSION

This Protestant submits that Division Two erred in its finding and order with respect to the issues raised by the CBT, as set forth herein and on brief.

WHEREFORE, your protestant prays that the Commission, upon reconsideration of the facts in the record, find the wheat rates in issue are in violation of Sections 3(1) and 4(1) of the Act as pointed out herein and that an appropriate order be issued as the Commission may deem necessary.

Respectfully submitted,

BOARD OF TRADE OF THE
CITY OF CHICAGO

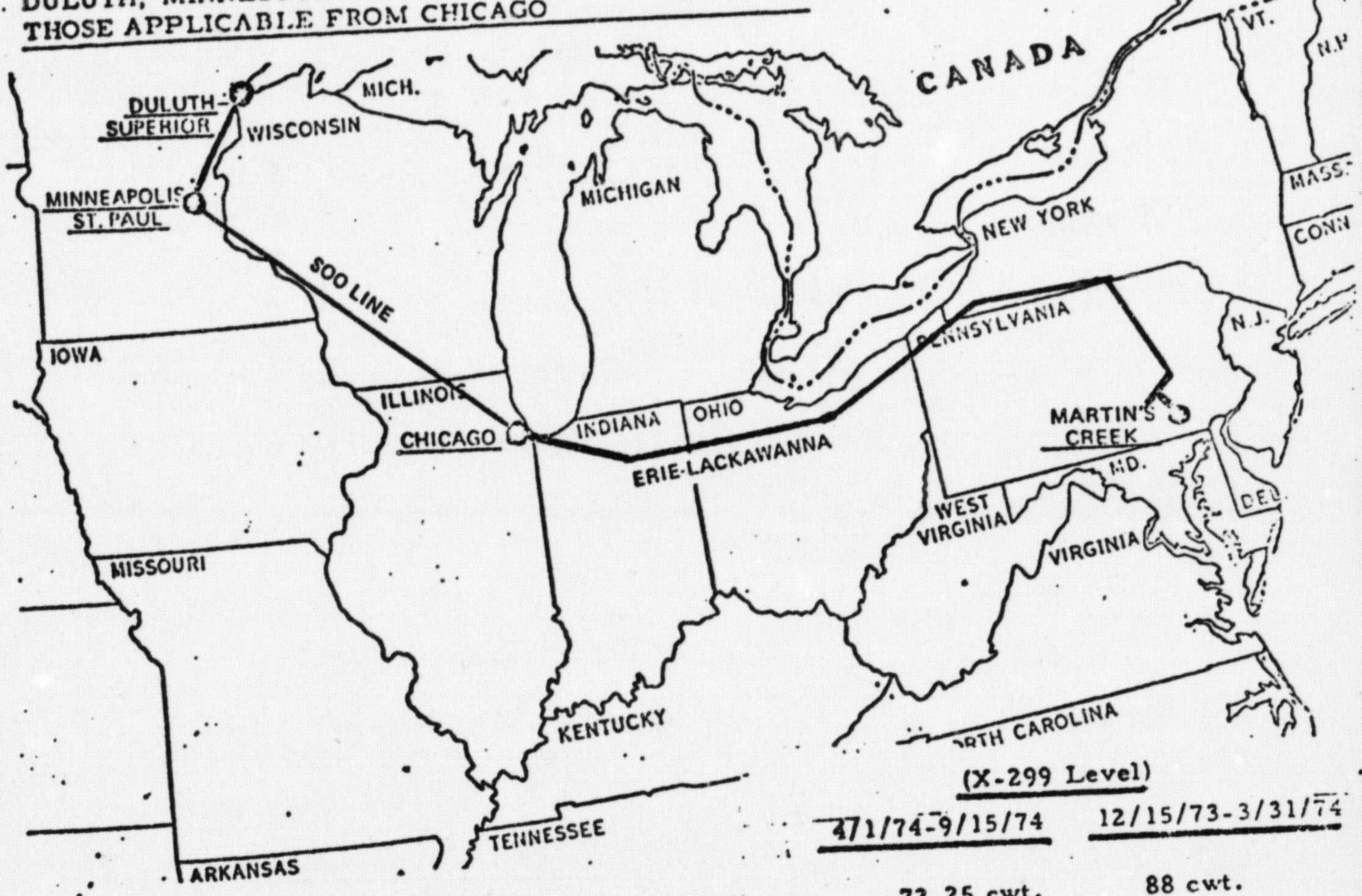
Frank E. Polom
Executive Director of Transportation
141 West Jackson Boulevard
Chicago, Illinois 60604

Dated at Chicago, Illinois
September 30, 1974

Appendix: A

I.C.C. Dkt: 8899

## COMPARISON UNIT TRAIN RATES TO MARTIN'S CREEK, PA. FROM MINNEAPOLIS -ST. PAUL, MINNESOTA AND DULUTH, MINNESOTA-SUPERIOR WISCONSIN WITH THOSE APPLICABLE FROM CHICAGO


CANADA
VT.
N.H.
MASS.
CONN
DULUTH-SUPERIOR
MICH.
WISCONSIN
MINNEAPOLIS ST. PAUL
MICHIGAN
NEW YORK
SOO LINE
N.J.
IOWA
PENNSYLVANIA
ILLINOIS
INDIANA
OHIO
CHICAGO
MARTIN'S CREEK
ERIE-LACKAWANNA
MD.
DEL.
WEST VIRGINIA
VIRGINIA
MISSOURI
KENTUCKY
NORTH CAROLINA
TENNESSEE
ARKANSAS

(X-299 Level)

| | 4/1/74-9/15/74 | 12/15/73-3/31/74 |
|---|---|---|
| From Minneapolis-St. Paul, Minn. (Proposed) | 72.25 cwt. | 88 cwt. |
| From Duluth, Minn. and Superior, Wis. (Proposed) | 72.25 cwt. | 88 cwt. |
| From Chicago, Ill. (Present Flat) | 98 cwt. | 98 cwt. |
| From Chicago, Ill. (Present Proportional) | 81 cwt. | 81 cwt. |

**Route:** From Minneapolis-St. Paul Route via Soo Line-Chicago, EL.
From Duluth-Superior Route via Soo Line-Chicago, EL.
From Chicago, Ill. Route via EL.

**Tariff Auth:** T.P.O. Beyer, Soo Line 543-B, I.C.C. 7837.
T.P.O. Maurer, C/TN-245-I, I.C.C. C-375, Section 5.

110 14

File

Before the

INTERSTATE COMMERCE COMMISSION

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# INVESTIGATION AND SUSPENSION DOCKET NO. 8899

## UNIT TRAIN RATES ON WHEAT
## MINN. & WISC., TO MARTINS CREEK, PA.

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# PETITION FOR RECONSIDERATION

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CONAGRA, INCORPORATED

By Donald Macleay
Peter A. Greene

Its Attorneys

Of Counsel:

MACLEAY, LYNCH, BERNHARD & GREGG
1625 K Street, N. W.
Washington, D. C. 20006

Due Date: October 2, 1974

Before The

INTERSTATE COMMERCE COMMISSION

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INVESTIGATION AND SUSPENSION DOCKET No. 8899

UNIT TRAIN RATES ON WHEAT,
MINN. & WISC., TO MARTINS CREEK, PA.

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## PETITION FOR RECONSIDERATION

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Comes now ConAgra, Incorporated (ConAgra), intervenor in support of respondents in the above captioned proceeding and respectfully petitions the Commission for reconsideration of the decision of Division 2 served herein on July 18, 1974, insofar as it finds that the unit train rate which is the subject of this proceeding in its application to movements from Minneapolis, Minnesota Transfer, and St. Paul, Minnesota (hereinafter referred to collectively as "Twin Cities") during the season of open navigation on the Great Lakes, is unlawful and in violation of section 3(1) of the Act. In support of its petition ConAgra states as follows:

## I

## PRELIMINARY STATEMENT

The rate which is the subject of this proceeding (hereinafter referred to as the "proposed rate"), is applicable on unit train movements of wheat in bulk from Duluth, Minn., and Superior, Wisc. (hereinafter referred to collectively as "Twin Ports") and from Twin Cities to Martins Creek, Pa. It is subject to a number of restrictive provisions designed to ensure maximum efficiency of operation and equipment utilization (Exh.1, pp. 4-5).

The level of the proposed rate as originally published is 72.25 cents per cwt. from April 1 to December 15, which corresponds to the period of open navigation on the Great Lakes and during the period of closed navigation on the Great Lakes (i.e., December 16 to March 31), the rate level is 88 cents per cwt.[1]

The proposed rate was published in Soo Line Freight Tariff 543-B, ICC-7837, issued September 28, 1973, to become effective November 1, 1973. Protests were filed on behalf of a number of flour millers, Buffalo, N.Y., port and civic interests and miscellaneous other interests. The Commission's Suspension and Fourth Section Board found no basis for suspending the proposed rate or for instituting an investigation of its lawfulness. Petitions for reconsideration were filed by various of the protestants and Appellate Division 2, by an order served October 31, 1973, found that " . . . there is reason to believe that . . . [the proposed rate] . . . would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act . . ." The order suspended the effectiveness of the proposed rate to and including May 31, 1974, and instituted an investigation of its lawfulness.

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[1] As the Division noted at sheet 2 of its decision, the level of the proposed rate has been increased subsequent to close of hearing to meet increases in the cost of lake transportation with which it is intended to compete, but such increase " . . . does nothing to change the ultimate findings and conclusions."

By order served November 20, 1974, the case was assigned for handling under special procedure and, pursuant to the of that order, verified statements embodying the direct evidence of participating parties were filed and served, and oral hearing for purposes of cross-examination was held at Washington, D. C., on January 28 through February 1, and February 4 and 5, 1974, before Judge Richard A. White. Briefs were filed on or before March 25, 1974 and thereafter, on

July 18, 1974, Division 2 issued the decision to which this petition is directed.[2]

## II

## THE DIVISION'S DECISION

The Division's decision found the proposed rate to be lawful in all respects, except that two of the three members of the Division concluded that the proposed rate is unlawful to the extent that the rate applicable from Twin Cities during the season of open navigation on the Great Lakes is below 88 cents per hundredweight (cwt.). Specifically, the Division stated as follows at sheet 30 of its decision:

> Upon consideration of all evidence of record, we conclude that the proposed 72.25-cent rate from Minneapolis, St. Paul and Minnesota Transfer, Minn., to Martins Creek, Pa., is unlawful to the extent that the rate from those points is less than 88 cents. We further conclude that the proposed 72.25-cent rate from Duluth-Superior (Twin Ports) during the season of open navigation on the Great Lakes and the proposed 88-cent rate from all tariff origins during the season of closed navigation are shown to be just and reasonable and otherwise lawful.

On the same sheet, Commissioner Hardin, dissenting in part, stated that:

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[2] In its decision Division 2 noted that: "Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of an Initial Decision."

> I disagree with the majority's holding that the maintenance of identical rates from the Twin Ports and Twin Cities to Martins Creek during the open navigation season is unduly preferential to inland points and unduly prejudicial to Twin Ports, or is otherwise unlawful.

At the outset, ConAgra wishes to make clear that it is gratified by the basic thrust of the Division's decision which establishes the complete lawfulness of the fundamental concepts upon which it is grounded. Specifically, the Division has recognized the right of rail respondents to compete aggressively and imaginatively for some share of the tremendous volume of grain traffic moving eastward through the Twin Cities and Twin Ports grain markets by taking full advantage of modern rail transportation techniques.[3/] It also acknowledges the right of ConAgra or any other miller to situate milling facilities close to major flour consuming markets in recognition of the fact that it costs less to move grain than it does to move flour, and thus, by positioning mills close to flour consuming markets, the transportation costs which must ultimately be borne by the consuming public, are minimized.

It is only with a single feature of the Division's decision that ConAgra must take issue. That single feature is the finding by two of the three members of the Division that the long standing

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[3/] One of protestants' principal witnesses, on the basis of 45 years of experience, candidly characterized unit train movement of grain as ". . . the most efficient method on railroads. . ." (Tr. 653).

relationship of rate parity between the Twin Cities and Twin Ports should be undone. For the reasons set forth hereinafter, ConAgra submits that such determination was erroneous, and must be reversed in order to avoid needless, serious and far reaching disruption of well established grain marketing patterns.

## III

## ARGUMENT

### A. The Determination Made By Two Of The Three Members Of The Division To Destroy The Long Established Rate Relationship Between The Twin Ports And The Twin Cities Would Actually Create Rather Than Obviate The Preference And Prejudice Which Are Stated As The Basis For Such Determination

As one of protestants' most knowledgeable witnesses candidly conceded, the grain merchandising markets at Twin Cities and Twin Ports are in reality "common markets" (Tr. 976). They draw grain from the same gathering areas under gathering rates that are equalized (Exh. 1, p. 6). The merchandisers who do business there and the millers who buy their grain there ship grain from both markets at rates that are equalized (Exh. 13, pp. 9-10). This has been the situation at least since the Commission's decision in Docket No. 17000 Part VII, Grain And Grain Products, 205 I.C.C. 301 (1934), in which the Commission determined that grain rates to and from the Twin Ports and the Twin Cities should be equalized. Merchandising patterns and practices, including the highly complex activity of grain pricing, have developed upon this foundation of parity and equality of transportation charges.

By destroying the relationship of equality with respect to the proposed rate with total disregard for the relationship of that action to other facets of ". . . so sensitive an organism as the grain rate structure. . ." [4/] the majority would actually create rather than preclude the very preference and prejudice which it condemns. The sole basis for the majority holding on the point to which this petition is directed is the fact that the Twin Cities are about 160 miles inland from the Twin Ports. Among the more fundamental facts that such a rationale ignores is that no grain is grown at either the Twin Cities or the Twin Ports. Instead, all of the grain shipped from those two common markets is grown on the plains of Western Minnesota and the Dakotas. From those growing locations it is shipped into the common markets of Twin Cities or Twin Ports on gathering rates which are equalized. Although this results in grain traveling further for the same rate when it goes to the Twin Ports as opposed to the Twin Cities, that fact has heretofore presented no problem, since everyone involved in the grain trade recognizes that the outbound movement from those common markets is under

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[4/] Board of Trade v. U.S., 314 U.S. 534, 548, 86 L.Ed. 432, 443 (1942).

equalized rates. Thus, the advantage initially realized by the Twin Ports on inbound movements over certain routings is offset by the advantage to the Twin Cities on outbound movements.

What the majority would now do by requiring an additive to outbound movements from Minneapolis to Martins Creek is to create a situation whereby merchandisers selling grain to ConAgra at Twin Cities would have to do so at prices reflecting transportation costs 15 cents higher than those incurred in merchanising grain through the Twin Ports, in spite of the fact that the total movement from gathering areas to ultimate destination over most routings via Twin Cities is substantially less than via Twin Ports. Clearly, it makes no more sense to impose an additive on outbound shipments from Twin Cities to reflect the difference of 160 miles between Twin Cities and Twin Ports than it would to impose an additive on inbound shipments to Twin Ports to reflect the fact that they move a greater distance than those transported to Twin Cities. To do so, would actually create the very inequity that the majority suggests as the basis for its action. As the Commission noted in Coal, Ky., Tenn., and Va. to North Carolina, 329 I.C.C. 572, 586-7 (1967):

> The rule with respect to competition in a common market is that every shipper competing therein is entitled to rates which are reasonable and just in comparison with rates from competing origins.

imposing a 15¢ per cwt. penalty on shipments moving via the Twin Cities in spite of the shorter distance moved would hardly be "reasonable and just" as required by the referred to rule.

Nor does the fact that the Twin Ports are located on the Great Lakes and the Twin Cities are not provide any justification for imposing a penalty on the latter, as is suggested by the majority. To begin with it should be emphasized that the proposed rate, although admittedly water related, is certainly not a depressed rate in any reasonable sense of the word. Rather, as even the cost evidence of protestants' demonstrates it is a rate which is not only fully compensatory but actually very profitable to respondents. Under such circumstances all facets of the proposed rate including the level applicable from the Twin Cities during open navigation season would be completely justified even in the absence of water competition because it reflects the level at which rail respondents can profitably handle grain when modern unit train techniques are employed. Where, as here, there is the additional factor of water competition via a directly competitive market the complete lawfulness of the proposed rate as it applied from the Twin Cities during open navigation season is doubly justified. As the Commission stated in Pig Iron From New York Points To Detroit, 296 I.C.C. 747, 752 (1955):

> The protestants contend that there is no justification for the establishment of so low a rate from points other than Buffalo which are not

> located on navigable water, pointing out that the cost of a rail haul to Buffalo and additional handling expenses are entailed in the movement from such points to Detroit by water . . . . These adjacent points have long been accorded the Buffalo rate. Where reduced rates have been established from certain points to meet water competition, carriers serving other producing points may be authorized to meet the market competition thus created.

In accord with the foregoing principle are *Oil Country Pipe, Midwest To Okla. & Tex.*, 326 I.C.C. 511, 523 (1966); *Sulphur, Canadian Origins to East St. Louis, Ill.*, 326 I.C.C. 288, 302 (1966); *American Sugar Refining Co.* v. *Ahnapee & W. Ry. Co.*, 322 I.C.C. 717, 721 (1964); *Wine, Pacific Coast to Western, S. W. & Central States*, 321 I.C.C. 683, 711 (1964); *Sugar To Ohio River Crossings*, 308 I.C.C. 167, 179 (1959); *Soda Ash To Georgetown, S. C.*, 269 I.C.C. 475, 478 (1947).

The most glaring inequity that would be created by the majority view can be illustrated by comparison of the proposed rate to the rate on which it is patterned, i.e., the unit train rate from Twin Cities and Twin Ports to Buffalo, which was the subject of Docket No. 34381, *Wheat, in Multiple Car Shipments, Minnesota and Wisconsin to Buffalo, New York* (not printed). As noted by respondents' witness, "The protested tariff publication was modeled, in large part, upon the Buffalo unit train rate. . ." (Exh. 1, p. 5).

Under that rate, miller protestants have had the benefit of unit train service to Buffalo on a year round basis for both Twin Cities and Twin Ports on a basis of complete rate parity. This gives them the flexibility to buy grain on equal terms at either Twin Ports or Twin Cities, depending upon availability at any particular point in time. The sole basis for the maintenance of parity in the Buffalo rate, as stated by Examiner Boisseree, in a report which was adopted by the Commission in Docket No. 34381, was: "To maintain normal rate relations between Duluth, the Twin Cities, including Minnesota Transfer and Superior. . ." (Exh. Rpt., p. 14). Ironically, the Division now rejects, without any explanation, the very basis upon which it awarded Buffalo millers equal access to both markets.

Being forced to pay a 15 cent per cwt. premium for access to the important Twin Cities grain market while its Buffalo competitors are left with access to it on terms completely equal to those applicable for the Twin Ports would leave ConAgra at an intolerable competitive disadvantage in purchasing grain in the important Twin Cities market. Thus, if the determination of the majority to which this petition is directed were to be sustained, ConAgra would have no choice but to institute proceedings to have the same ruling applied to the Buffalo unit train rate. ConAgra, and other parties of interest, should not be forced into such disruptive litigation without a far more compelling justification for the action taken by the majority than is evident on this record.

### B. The Record Is Totally Devoid Of Any Evidentiary Basis For The Assumption Made By Two Of The Three Members Of The Division That Application Of The Open Navigation Season Rate Level From The Twin Cities Would Injure Anyone

In view of the radical departure from long established relationship which the majority determination represents, it might be expected that such extraordinary action was impelled by the need to protect some interests from serious injury. The record, however, is totally devoid of any indication of any cause for such concern. Certainly the very brief treatment of this issue in the Division's decision provides none.

As the Supreme Court observed in Board of Trade v. United States, 314 U.S. 534, 547, 86 L.Ed. 432, 443 (1942), the truest indication of the effect of a rate is ". . . a thorough test over an adequate period of normal conditions in the grain trade. . ." Here, the Commission has had the benefit of more than ten years' experience with the Buffalo unit train rate, a rate which the Duluth Port Authority doesn't like any more than the proposed rate (Ex. 13, p. 9). To date, no one has been prejudiced or afforded preferential treatment as a consequence of that rate.[5/] Indeed, no one has been shown to have suffered

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[5/] The evidence submitted by Duluth Port Authority demonstrates that it handled a total of 61,365,000 bushels of domestic grain shipments in 1962, the last full year before the Buffalo unit train rate became effective. During 1973 it handled 85,184,000 bushels (Ex. 13, App. A).

any injury as a consequence of the whole concept of equalization between the Twin Ports and the Twin Cities which has existed for many years. The instant rate is nothing more than an extension of that same concept.

Although the majority opinion on this point is far from clear as to its basis, it appears to be predicated upon the conclusion that application of the open navigation season rate from Twin Cities would constitute a violation of section 3(1). However, far more is required to support such a finding than appears in this record. See, for example, Cudahy Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co., 234 I.C.C. 569, (1939), wherein the Commission, in discussing section 3(1), observed:

> General declarations as to competition or injury unsupported by evidentiary facts, and the mere showing of disparity of rates, are not sufficient for the predication of a finding of undue preference and prejudice. * * * To establish undue prejudice, in addition to showing that there is a difference in rates and that there is some competition between shippers there must be a further showing that the difference has operated to complainant's disadvantage in purchasing or marketing its commodity. The character or intensity of the competition, the specific effect of the rate relation upon such competition, and the extent to which conditions affecting transportation are properly comparable must be shown in addition to the difference in rates * * *.

None of the foregoing information has been provided by protestants. Thus, on the record in this proceeding no grounds have been demonstrated for the radical disruption of long established grain marketing patterns proposed by the majority.

## IV

## CONCLUSION AND PRAYER

The basic thrust of the Division's decision, as to which all three members were in agreement, is that rail respondents and ConAgra should be permitted to take full advantage of what even protestants have conceded to be ". . . the most efficient. . ." method for moving grain to ConAgra's Martins Creek milling facility. As noted at the outset of this petition, ConAgra takes no issue with the fundamental validity of that determination. It is only with respect to the ancilliary question of whether the longstanding rate relationship existing between Twin Cities and Twin Ports should be undone, a question as to which the Division was unable to reach agreement, that ConAgra takes issue.

On this point ConAgra respectfully submits that the disruption of that relationship, upon which the delicate and intricately balanced grain trade has come to rely during the many years of its existence, would actually result in the very prejudice which the majority states as the justification for its action. It would do so for no valid purpose since the record is totally lacking in any evidence to substantiate a need for such radical disruption in order to protect the legitimate interests of anyone.

WHEREFORE, for all of the foregoing reasons, ConAgra respectfully prays that an order be entered setting aside that part of the Division's decision ordering cancellation of the open navigation season level of the proposed rate as it applies from the Twin Cities, and finding instead that the proposed rate is lawful and proper in every respect.

Respectfully submitted,

CONAGRA, INCORPORATED

By____________________________
Donald Macleay
Peter A. Greene
Its Attorneys

Of Counsel:

MACLEAY, LYNCH, BERNHARD & GREGG
1625 K Street, N. W.
Washington, D. C. 20006

Due Date:

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon counsel for all parties of record via first class mail, postage prepaid, this 2nd day of October 1974.

____________________________
Peter A. Greene

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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INVESTIGATION AND SUSPENSION DOCKET NO. 8899

UNIT TRAIN RATES ON WHEAT,
MINN. & WISC. TO MARTINS CREEK, PA.

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# PETITION OF THE STATE OF NEW YORK FOR RECONSIDERATION

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DUE DATE: October 2, 1974

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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INVESTIGATION AND SUSPENSION DOCKET NO. 8899

UNIT TRAIN RATES ON WHEAT,
MINN. & WISC. TO MARTINS CREEK, PA.

---

# PETITION OF THE STATE OF NEW YORK FOR RECONSIDERATION

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Comes now the State of New York and files this petition for reconsideration of the decision of Division 2 served July 18, 1974. By order served August 15, 1974, the Commission permitted the State of New York to intervene in support of protestants, to become a party to this proceeding, and to consolidate the interests of parties representing certain New York State interests.

## PRELIMINARY STATEMENT

At issue in this case is the lawfulness of unit train rates on wheat from Minnesota and Wisconsin to Martins Creek, Pa. Division 2 found the proposed rate from Minneapolis, Minnesota Transfer, and St. Paul, Minn., to Martins Creek, Pa., to apply during the season of open navigation on the Great Lakes unlawful, but it found the proposed rates from Minneapolis, Minnesota Transfer, and St. Paul, and Duluth, Minn., and Superior, Wisc., to apply during the season of closed navigation on the Great Lakes and from Duluth, Minn., and Superior, Wisc., to Martins Creek to apply during the season of open navigation just and reasonable and not otherwise unlawful.

The proposed rates at the Ex Parte No. 299 level were 72.25 cents to apply from April 1 through December 14 and 88 cents to apply from December 15 through March 31. As the report notes, the 72.25-cent rate to apply during the season of open navigation was raised to 78.25 cents effective June 1, 1974, but the report was prepared on the basis of the 72.25-cent rate and the cost and other evidence evaluated on that basis. For convenience, therefore, we will also refer to the 72.25-cent rate.

## ARGUMENT

### The 72.25-cent rate violates Section 3(1) of the Act.

Buffalo, N.Y. is an important flour milling center. The mills have located there primarily to take advantage of the low cost lake vessel transportation available for the movement of wheat from Twin Ports (Duluth, Minn. - Superior, Wisc.) to Buffalo. ConAgra, the supporting shipper, located its flour mill at Martins Creek, Pa., because "it is cheaper to move wheat in large volumes for long distances than flour" and "the Martins Creek mill is less than 100 miles from major consuming centers in New York, New Jersey, and eastern Pennsylvania." (Report, p. 24). The Buffalo mills compete with the Martins Creek mill in the purchase of wheat produced in the Dakotas and Minnesota and in the sale of flour in the eastern market.

The 72.25-cent rate is designed to meet Con Agra's costs in moving wheat to Martins Creek by alternative means of transportation during the open season of navigation on the Great Lakes. The alternative costs, composed of lake transportation (26.67 cents per 100 pounds for transporting wheat from Twin Ports to Buffalo), elevation (5 cents per 100 pounds), and rail transportation (40-cent five-car rate from Buffalo to Martins Creek), produce a through charge of 71.67 cents.

Respondents also publish a 43-cent unit train rate from Twin Ports to Buffalo which is designed to provide an alternative to the practice of storing wheat in vessels during the closed season of navigation. Winter storage involves various cost elements in addition to cross lake navigation charges and charges for using the vessel for storage. Factors such as interest, insurance and fluctuations in wheat prices following the close of the season of navigation were taken into account in constructing the level of the Buffalo unit train rate.[1] This rate is not competitive with the lake vessel charges available during the open season of navigation. Indeed, as the Commission notes at page 21 of the report, in the ten years since the rate was first established, all of the Buffalo unit train movements, with but one possible exception, have moved during the season of closed navigation.

At page 23 of the report, the Commission states that the protestant flour mills pointed out:

> ". . .that the Buffalo unit train rate is not competitive with lake vessel service during the season of open navigation. The Buffalo millers do not have a unit train rate offering a service competitive with the lake vessel service during the season of navigation. Yet ConAgra, while purporting to seek only what the Buffalo millers have, is actually asking for unit train service to compete with the lake vessel movement during the navigation season."

However, the Commission does not discuss this issue or attempt to determine whether these facts make the proposal unlawful.

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[1] Verified Statement of James R. Scoggin, p. 4.

Section 3(1) of the Act makes it unlawful for any carrier to give any particular firm or locality "any undue or unreasonable preference or advantage . . . in any respect whatsoever" or to subject any particular firm or locality "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The proposal clearly violates Section 3(1). Respondents propose to give the Martins Creek mill a water competitive rate so that it will have an alternate means of transporting its wheat during the open navigation season. At the same time, respondents are holding the Buffalo unit train rate up to such a high level that it moves no traffic during this season and, in effect, constitutes an embargo.

The 88-cent Martins Creek rate which applies during the closed navigation season is constructed on the basis of the 43-cent Buffalo unit train rate. Hence, Buffalo and Martins Creek are being treated equally during the closed season. However, the 72.25-cent Martins Creek rate which applies during the open season is constructed on the basis of the 26.67-cent lake vessel charge from Twin Ports to Buffalo. Hence, Buffalo and Martins Creek are being treated unequally during the open season. Equal treatment requires that, if water competitive rates are to be available at all during the open season, they be available to both Buffalo and Martins Creek. This would require a reduction in the Buffalo rate to 26.67 cents during the open season.

The availability to Martins Creek of a water competitive rate during the navigation season obviously gives it an advantage over Buffalo. Martins Creek will have, while Buffalo will not have, an alternative means of transportation. This is important when, for one reason or another, shipping on the Great Lakes is interrupted, the closed season is longer than normal, or, as is often the case, a shipper is unable to obtain vessels when they are needed.

Moreover, the water competitive rate gives the Martins Creek mill the option of shopping for the lowest transportation costs, an option that is unavailable to the Buffalo mills. While respondents have stated their intention to adjust the 72.25-cent rate to reflect any changes in lake vessel charges, such adjustments can be made only upon notice and are subject to review by the Commission. In contrast, lake vessel charges, which are not subject to regulation, can be changed at will and with no notice at all. The record shows that lake vessel charges have increased almost 45 percent or about 7.5 percent a year from 1966 through 1971. (Report, p. 22). Respondents latest filing concerning the 72.25-cent indicates that they have increased from 26.67 cents, when the original filing herein was made, to 36.6 cents in July of this year,[2] or a 37 percent increase in little over a year. Taking into consideration the inevitable lag respondents will experience in making adjustments in their rate and the continuing inflation, there will unquestionably be significant periods of time when the Martins Creek mill will have an unfair competitive advantage over the Buffalo mills. Since the Commission found that "the marketing of flour is a competitive business with sales turning on as little as a cent or less difference per 100 pounds,"[3] the advantage will have serious adverse consequences for the Buffalo mills.

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[2] See Application No. 850 for Special Permission filed July 2, 1974 submitted in behalf of the Soo Line Railroad Company and the Erie Lackawanna Railway Company.

[3] Report, p. 25.

The discrimination here is no different from that condemned in Preston - Shaffer Milling Co. v. Great Northern Ry. Co., 304 I.C.C. 491 (1958), where the railroad's failure to establish joint rates for the movement of complainant's traffic was found unduly prejudicial to the complainant's mill and unduly preferential of competitors' mills located on routes over which joint rates applied. It is no different from the discrimination found unlawful in Washington, D.C., Store Door Delivery, 27 I.C.C. 347 (1913), where the railroads proposed to discontinue free delivery in Washington, D.C. while continuing it in Baltimore, Md. True enough, respondents here purport to hold out Buffalo unit train service during the open season, but they do so at a price that prohibits the Buffalo shippers from using it. The maintenance of rates at levels that foreclose the movement of traffic constitutes a refusal to serve. See Restrictions on Service By Motor Common Carriers, 111 M.C.C. 151 (1970).

The foundation stone upon which the Interstate Commerce Act rests is that of absolute equality, not only as to rates, but also as to the conveniences and facilities to shippers in any of the details of transportation service. United States ex rel Morris v. Delaware, L. & W.R. Co., 40 Fed 101. The Supreme Court has said: "The principal evil at which the Interstate Commerce Act . . . was aimed was discrimination in its various manifestations." State of New York v. United States, 331 U.S. 284, 296 (1947). In the first volume of its reports and during the first year of its existence, the Commission made it plain that "a common carrier is under obligation to serve the public equally and justly. He must know no friends and concede no unequal favors. The common carrier has no right to select either goods or customers." Riddle, Dean & Co. v. New York, L.E. & W.R. Co., 1 I.C.C. 594. The Commission has followed these principles for over three quarters of a century. There is no basis for departing from them here. Hence, we urge the Commission to find that the proposal results in undue preference and prejudice and is therefore unlawful.

## ERIE'S NET REVENUE POSITION WILL BE WORSENED BY THE PROPOSAL

From the opening of the Martins Creek mill in May 1973, ConAgra has obtained wheat from two elevators in Buffalo. During the period from May through November 1973, 68 percent of this traffic was handled by Erie under a five-car rate of 40 cents from Buffalo to Martins Creek, a distance of about 340 miles. The balance of the traffic moved by non-regulated motor carriers. Under the proposed rate, Erie would move wheat from Chicago, a distance of about 910 miles, at a charge of about 47 cents (Erie's division of the proposed rate of 72.25 cents).

The protestant flour mills submitted a study of the costs incurred in handling traffic under the 40-cent rate from Buffalo to Martins Creek, and those incurred in moving traffic under the proposed rates from Chicago to Martins Creek. The Commission accepted this study as a valid portrayal of the cost of providing the respective services and found that "the 40-cent Buffalo - Martins Creek rate on a per 100-pound basis would appear to be substantially more profitable than is Erie's share of the proposed rate." (Report, p. 16). The study shows that Erie would have to substantially increase its participation in the shipper's traffic above 68 percent in order to avoid a net revenue reduction. It would have to handle from 15 percent to 24 percent more of the shipper's traffic just to break even. However, there is no basis for assuming that Erie will handle any more traffic under the proposed rates than it handles under the existing rates.

The proposed rates are designed only to meet the existing water-rail and all-rail transportation alternatives available to ConAgra. They are not designed to meet the existing motor carrier competition which moved 32 percent of the shipper's traffic at substantially lower rates. It was shown that the use of motor carrier service would result in savings of 9.25 cents during the open navigation season and 7 cents during the closed season. Moreover, ConAgra does not view itself as "locked-in" or committed to use the proposed rates. In view of these facts, it is unreasonable to assume that ConAgra will abandon the lower cost motor carrier transportation service available to it, and tender all or nearly all of its traffic to respondents. Nevertheless, the Commission made this assumption. We submit that it was clear error to do so. The only reasonable assumption based upon the facts is that Erie may continue to participate in as much as 68 percent of the shipper's wheat traffic.

What effect, if any, the 6-cent increase in the 72.25-cent rate would have on Erie's net revenue position cannot be determined on this record. All costs have increased since the close of the record and it would be necessary to re-open the proceeding and up-date the various exhibits. It is clear, however, that the increase will place the non-regulated motor carriers in an even better position to compete for the supporting shipper's traffic. Hence, the Commission's error has been compounded by the subsequent action of the respondents.

The Commission stated that "full consideration must be accorded to the effect Erie's division of the proposed rate will have on the carrier's net revenue position and on its ability to continue providing service in the eastern United States." (Report, p. 16). Since there is no basis for concluding that the proposal will do anything but worsen Erie's net revenue position, the Commission must find the proposed rates unlawful and order them cancelled.

Respectfully submitted,

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Due Date: October 2, 1974

## Certificate of Service

I hereby certify that I have this 2nd day of October, 1974, served a copy of the foregoing petition for reconsideration upon all parties of record, by first class or air mail, properly addressed with postage prepaid.

Patrick McEligot

Patrick McEligot

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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I&S DOCKET NO. 8899

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# UNIT TRAIN RATES ON WHEAT, MINNESOTA AND WISCONSIN TO MARTINS CREEK, PA.

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## RESPONDENTS' REPLY TO PETITIONS FOR RECONSIDERATION

---

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Counsel for Respondents

Due Date: October 22, 1974

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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I&S DOCKET NO. 8899

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# UNIT TRAIN RATES ON WHEAT, MINNESOTA AND WISCONSIN TO MARTINS CREEK, PA.

---

# RESPONDENTS' REPLY TO PETITIONS FOR RECONSIDERATION

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Respondents Soo Line Railroad Company, (Soo) and Erie Lackawanna Railroad Company (Erie) file herewith their reply to the petitions of the State of New York (New York), the Chicago Board of Trade (Chicago Board) and the Lake Carriers Association (Lake Carriers) seeking reconsideration of the July 18, 1974, Order of the Commission, Division 2, unholding the lawfulness of unit train rates on wheat applicable from the Twin Ports (Duluth-Superior) and Twin Cities (Minneapolis-St. Paul) to Martins Creek, Pennsylvania.

## I.

## PRELIMINARY STATEMENT

After extensive hearings and the filing of lengthly briefs which thoroughly reviewed the law and facts involved in this case, the Commission, Division 2, unanimously found the proposed navigation season rate of 72.25 cents per cwt. (effective April 1 through December 15) from the Twin Ports to Martins Creek and the proposed non-navigation season rate of 88 cents per cwt. (December 16 through March 31) from the Twin Ports and the Twin Cities to Martins Creek, Pennsylvania to be lawful. *

Only three petitions for reconsideration of the Commission's July 18, 1974 Order have been filed by protesting parties. No such petitions have been filed by the two parties who most actively opposed the proposed rates, namely, the Buffalo flour mills and Penn Central Railroad, nor have such petitions been filed by protestants Seaway Port Authority of Duluth, International Association of Great Lakes Ports or the Board of Trade of Kansas City, Missouri.

Subsequent to the issuance of the Commission's Order the State of New York was permitted to intervene in these proceedings to represent the interests of the City of Buffalo, the County of Erie, the Niagara Frontier Transportation Authority and the Buffalo Area Chamber of Commerce. The interest of these parties, of course, is essentially political. None of them is a shipper or receiver of railroad freight or engaged in any facet of milling operations.

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*Respondents, ConAgra, Inc. and intervenor Rock Island Railroad have petitioned for reconsideration of that part of the Commission's Order finding the navigation season rate from the Twin Cities to Martins Creek to be unlawful.

This reply will address itself to New York's contention that the proposed rates give Martins Creek, Pennsylvania an undue preference over the Buffalo milling interests in violation of Section 3(1) of the Act and that "Erie's net revenue position will be worsened by the proposal"; the Chicago Board's contention that failure to make the Martins Creek rates available from Chicago, Illinois violates Section 3(1) and 4(1) of the Act; and the Lake Carriers' vague contention that the proposed unit train rates are too low.

Respondents consider highly significant the fact that the Buffalo Mills and Penn Central, the only parties introducing evidence intended to show that the proposed rates gave Martins Creek an undue preference over Buffalo and that they would adversely affect the Erie's economic position, have accepted the Commission's July 18, 1974 order finding those rates to be lawful in all respects, Furthermore, there is no shipper testimony supporting the Chicago Board's contention that the proposed rates should be made available from Chicago, Illinois.

## II.

## ARGUMENT

### 1. There Is No Merit To New York's Contention The Proposed Rates Violate Section 3(1) Of The Act.

In January, 1974, when this matter was heard, the proposed navigation season rate was 72.25 cents per cwt., approximately 68% higher

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than the 43 cent unit train rate in effect from the Twin Cities and Twin Ports to Buffalo, New York. Today, at the Ex Parte 305-A level, the proposed rate is 89 cents per cwt., approximately 76% higher than the current 50.5 cent Buffalo unit train rate. The rail distances from the origins here involved to Martins Creek exceed the rail distances to Buffalo by slightly over 200 miles or less than 20%. These facts, standing alone, refute the contention, abandoned by the Buffalo mills but now adopted by the State of New York, that this proposed rate gives the Martins Creek mill an undue preference over the mills located at Buffalo. The sole argument voiced in the New York petition in support of its Section 3(1) allegation is that the Martins Creek navigation season rate is "water competitive" whereas the unit train rate to Buffalo is so high as to constitute an "embargo" during these navigation season.

New York's contention that Martins Creek has a water competitive rate, whereas the rate to Buffalo is set "at a price that prohibits the Buffalo shippers from using it" during the open season of navigation on the Great Lakes, is a gross distortion of the facts. The Buffalo unit train rate, as previously noted, is presently 38.5 cents per cwt. lower than the Martins Creek rate. Buffalo millers are not prohibited by the level of the Buffalo unit train rate from shipping unit trains during the navigation season. Rather, they voluntarily choose not to use that rate, generally,* because they have available to them exempt water carriage at transportation charges which are substantially lower than the current Buffalo unit train rate. The record in this proceeding shows that the respondents' costs of moving unit trains from Twin Ports to Buffalo exceed the water carrier rates available to the Buffalo millers in moving grain from the Twin Ports to Buffalo via the Great Lakes. The record also shows that respondents have published unit train rates from the Twin Ports to Martins Creek which are both highly profitable to the carriers and sufficiently low to be competitive with the exempt water-truck competitive service available to ConAgra's Martins Creek flour mill. The contention that such a rate, which is 38.5 cents per cwt. higher than the Buffalo unit train rate, is unduly preferential to Martins Creek and prejudicial to Buffalo is preposterous.

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*The record indicates some movement of unit trains to Buffalo during the navigation season. (Tr. 1254)

Section 3(1) of the Act was designed to protect shippers, rather than political interests. The Commission concluded the proposed rate did not violate Section 3(1) insofar as the Buffalo mills are concerned after a careful review of the record which demonstrated, among other things, that the proposed rate merely duplicated the cost which ConAgra incurs in moving wheat from the Twin Ports to Martins Creek via alternative modes of transportation. The Buffalo mills have acceeded to the Commission's Order holding the proposed rate does not violate Section 3(1) of the Act by failing to petition for reconsideration of the Commission's July 18, 1974 Order.

As noted in the petition for reconsideration filed by the Chicago Board, the Commission recently identified the elements necessary to establish undue preference and prejudice and established the burden of proof as to each element, as follows:

> "To support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the defendant carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. Compare Big River Industries Inc. v. Aberdeen & R.R. Co., 329 I.C.C. 539. The complainant has the burden of proving the presence of the first three factors, and the defendants have the burden of justifying the disparity under "4". (Board of Trade of the City of Chicago v. Illinois Central Railroad Company, et al, 344 I.C.C. 818, 830-831).

Clearly, the interests represented by New York in this proceeding have not met their burden of proving actual or potential competitive injury. In fact, they produced no evidence in this record on that point. The only parties involved in this proceeding who did attempt to adduce any such evidence, the Buffalo mills, have acquiesced in the Commission's conclusion that no Section 3(1) violation existed.

### 2. There Is No Merit To New York's Contention That "Erie's Net Revenue Position Will Be Worsened By The Proposal".

The preponderence of evidence introduced in this record by protestants was directly to the matter raised in New York's second contention. The Buffalo mills introduced a voluminous cost study designed to show that the Martins Creek unit train rates would reduce the Erie's annual net revenues by a minimum of $35,700 (Ex. 31, p. 16)*. Protestant Penn Central submitted evidence designed to show the proposed unit train operation would not produce the economies and efficiencies inherent in

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*At the hearing this figure was increased by Witness Bilz by $7,000 (Tr. 1090) "classic" unit train operations. The Erie's evidence showed a net contribution increase of $100,000 annually, if the proposed rates were used to move all of ConAgra's traffic and some improvement in net contribution if the proposed rates only slightly increased the Erie's participation. These calculations ignored other Erie benefits inherent in the proposed unit train operation.

The Commission discussed this evidence at great length in its Order (see pp. 12-20), and properly concluded it should not interfere with the Erie's managerial discretion in deciding whether or not to participate in the proposed unit train rates. In this connection, the Commission stated:

> "In connection with our review of the record as next discussed, it should be borne in mind that persons responsible for performing transportation services, as well as the agencies which administer the various transportation statutes, are seldom if ever in a position where the outcome of a particular course of action can be charted with complete assurance that the hoped-for goal will be achieved. In a sense, the success of a transportation venture is dependent on a host of business, commercial, and competitive factors whose influence cannot all be evaluated or even known at any one time. Risk, uncertainty, and some confusion attend every venture, and so it is here."

* * * * * *

> "One final observation is in order. We recognize the financial plight of Erie and the broad public interest in preserving a viable network of railroad service. We believe that the proposed rates are a step toward realizing Erie's goal of improving its financial standing. The proposed rates do not constitute an irrevocable commitment of Erie's resources. They carry an expiration date of September 15, 1974, and thus will afford respondents an opportunity to review the performance of the rates in terms of effect on the carrier's net revenue position." (pp. 16-17)

As noted by respondents in their brief filed on March 25, 1974, commencing at page 16, the Interstate Commerce Act does not require a carrier to prove that a proposed rate will improve its net earnings. In any event, after reviewing all of the evidence directed to this point, the Commission correctly concluded that "the proposed rates are a step toward realizing Erie's goal of improving its financial standards". This finding has not been challenged by the only protestants who attempted to prove otherwise. The State of New York has cited neither reason nor authority for overturning this finding which is clearly supported by the record. As noted by the Commission, because the proposed rates call for annual expiration dates, they will, annually, "afford respondents an opportunity to review the performance of the rates in terms of effect on the carriers' as net revenue position." To hold the proposed rates unlawful would deprive respondent Erie of the opportunity of testing the soundness of its judgment that the proposed rates will make a positive contribution to annual net revenues.

## III.

### 3. There Is No Merit To The Chicago Board's Contention The Proposed Rates Violate Section 3(1) or 4(1) Of The Act.

The Chicago Board's petition for reconsideration raises no new issues of fact and cites no additional authority in support of its position, originally set forth in its Suspension Petition and repeated in its brief, that failure to make the proposed rates available to Chicago, Illinois violates

Section 3(1) and 4(1) of the Act. The Commission dealt with these issues jointly at pages 28-29 of the Order and correctly concluded "that the proposed rates are not in violation of either sections 3(1) or 4(1) of the Act insofar as these issues are raised by this protestant." The Commission further noted that "the fourth section issue will be resolved in Ex Parte No. 304. The latter is a general rule making proceeding where full consideration can be accorded the questions of policy raised by protestant".

Insofar as the Chicago Board's Section 3 argument in concerned respondents merely note that no Chicago based shipper has complained that it is unduly prejudiced by failure to accord it the Martins Creek unit train rate from that origin. Thus, clearly, there is no proof of "actual or potential competitive injury" by a complaining party as is required for the Commission to find a Section 3(1) violation to exist. While Exhibit 12, Appendix A, identifies certain grain elevators which presumably have the capacity to load unit trains, there is no showing that any of said elevators gather, store and have available for sale to ConAgra the hard spring wheat produced in western Minnesota, the Dakotas and Montana which ConAgra desires to ship to Martins Creek under the proposed unit train rates. Generally the wheat which the proposed rate is designed to move is gathered only at the Twin Cities and the Twin Ports and merchandized only at those locations.

The Buffalo unit train rate has been published as a proportional rate without an intermediate origin rule for many years. The proposed rate publication is identical in all material respects with the form of the Buffalo rate insofar as Section 3(1) and 4(1) questions involving Chicago are concerned. No shipper has ever complained of the non-availability of the Buffalo unit train rate from Chicago or any other intermediate point. Respondents did not include an origin intermediate rule in the proposed rate because they deemed it to be inconsistent with the theory of proportional rates.

Section 4(1) only makes it "unlawful for any common carrier... to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." (Emphasis supplied.) The Commission has held that unit train or multiple-car rates are not "like" single-car rates in the context of Section 4. (See Coal from Ill., Ind, and Ky., to Illinois and Indiana, 308 I. C. C. 671 (1959) and In the Matter of Container Service, 173 I. C. C. 377. This holding is dispositive of the issue raised by the Chicago Board.

One of the principal traffic witnesses testifying for respondents, after expessing his opinion that no fourth section violation was involved, stated "...if the Commission decides otherwise, respondents are willing to amend the protested publication in whatever manner is required to meet Section IV proscriptions". (Exhibit 1, pp. 17-18). Respondents hold to that position and will comply with any order the Commission may issue, either before or after a decision is rendered in Ex Parte No. 304, Amendment of Rule 27 of Tariff Circular No. 20-Intermediate Application of Rates.

However, respondents do not believe any traffic would move from Chicago to Martins Creek if intermediate application of the rates were prescribed. Certainly there is no evidence in this record suggesting that it would.

### 4. The Proposed Navigation Season Rate Is Higher Than The Level Recommended By Lake Carriers.

Lake Carriers brief petition for reconsideration, citing no authority and making no reference to any provisions of the Act, alleges there have been substantial increases in lake carrier costs since the record was closed and asserts that: "[i]f respondents are sincere in their assertion that they do not intend to go any lower than necessary to meet the alternative transportation costs available to the shipper, it would seem that the [navigation season] rail unit train rate from the Twin Ports to Martins Creek should not be pegged any lower than 88 cents...."

On June 1, 1974 the respondents increased the 72.25 cent rate to 78.25 cents. As noted at page 2 of the Commission's Order, "this increase lessens the import of some of the protestants objections". That import was further reduced on June 20, 1974, when the navigation season rate was increased under Ex Parte 305-A to 89 cents per cwt. Clearly, this action demonstrates the sincerity of the respondents' stated intention to "peg" the navigation season rate,year by year, at a level which approximates the transportation charges which ConAgra would incur in moving wheat from the Twin Ports to Martins Creek by alternatives modes of transportation. The present navigation season rate level is 1 cent per cwt. higher than the level recommended by protestant Lake Carriers.

The non-navigation season 88 cent per cwt. rate will be increased prior to December 15, 1974 to approximate the level of the Buffalo unit train rate in effect for the coming season, plus the other factors originally used to construct the 88 cent rate (current elevation charges and the current Buffalo-Martins Creek rail rate). *

## IV.

## CONCLUSION

Division 2 has unanimously found the navigation season rate to be lawful from the Twin Ports and the non-navigation season rate to be lawful from both the Twin Ports and the Twin Cities. The primary protestants in this proceeding, the Buffalo flour mills and Penn Central, have accepted the Commission's conclusion that these rates comport in all respects with the provisions of Section 1(5), 1(6), 3(1),4(1), 6, 15a(2) and 15a(3) of the Interstate Commerce Act and the National Transportation Policy. The three protestants filing petitions for reconsideration have cited no new facts, reasons, or valid authorities in support of their Section 3(1) and 4(1) arguments. The Commission's ultimate conclusion that the proposed

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*Respondents have just received the Reply filed by International Association of Great Lakes Ports, et al and note their reference (pp. 9-10) to a Soo Line W. T. L. application to cancel the Buffalo unit train rate because "current rates and current divisions basically make this operation non-compensatory". The Soo Line and other railroads participating in the Buffalo unit train movements are in the process of establishing a compensatory Buffalo unit train rate level for the coming season and may re-negotiate the present divisional arrangments. Respondents, Penn Central and other railroads have every intention of handling unit trains from the Twin Cities and/or Twin Ports to Buffalo during the 1974-75 season and the Commission should totally disregard the Great Lakes Port's argument, referred to above, until such time, if ever, as the Buffalo rate is actually cancelled. Indeed, the contents of pages 9-10 of the Port's Reply are susceptible to a motion to strike as a highly improper excursion beyond the record.

rates are not unduly preferential, prejudicial, or otherwise unlawful have abundant support in the record and must be affirmed.

WHEREFORE, respondents respectfully request that the Commission, Division 2, deny the petitions for reconsideration filed by New York, the Chicago Board and Lake Carriers. Respondents also request that the Commission reverse that portion of its Order finding the navigation season unit train rate from the Twin Cities to Martins Creek to be unlawful.

Respectfully submitted,

J. T. Clark
1336 Midland Building
Cleveland, Ohio 44145
Attorney for Respondent Erie
Lackawanna Railway Company
Thomas F. Patton &
Ralph S. Tylor, Jr., Trustees

C. Harold Peterson
804 Soo Line Building
Minneapolis, Minnesota 55440
Attorney for Respondent Soo
Line Railroad Company

## CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 1974, I served a copy of the foregoing petition upon all parties hereto by mailing to them a copy of the same, postage prepaid, in accordance with the General Rules of Practice of the Interstate Commerce Commission.

C. Harold Peterson

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Before the

INTERSTATE COMMERCE COMMISSION

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I. & S. Docket No. 8899

# UNIT TRAIN RATES ON WHEAT, MINN. & WISC., TO MARTINS CREEK, PA.

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# PETITION FOR LEAVE TO INTERVENE

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ISRAEL PACKEL, Attorney General
Capitol Annex
Harrisburg, Pa. 17120

GORDON P. MacDOUGALL, Spec.Asst.Atty.Gen.
705 Ring Building
Washington, D.C. 20036

Attorneys for Commonwealth of Pennsylvania

October 22, 1974

Before the

INTERSTATE COMMERCE COMMISSION

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I & S. Docket No. 8899

UNIT TRAIN RATES OF WHEAT,
MINN. & WISC., TO MARTINS CREEK, PA.

---

## PETITION FOR LEAVE TO INTERVENE

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Commonwealth of Pennsylvania, by its Attorney General, submits this petition for leave to intervene in this proceeding. The purpose of the proposed intervention is to file the attached reply to the petition for reconsideration, filed on or about October 2, 1974, by the State of New York.

The report of Division 2 was entered June 18, 1974 (served July 18). The State of New York on August 9 petitioned for leave to intervene in support of the protestants, and for an extension of the period within which to file a petition for reconsideration of the June 18 report. New York's intervention and extension of time were granted August 14.

Commonwealth of Pennsylvania desires to intervene in this proceeding to defend the report of Division 2 that the proposed rates do not constitute undue preference or advantage to Martins Creek, Pa. and undue prejudice or disadvantage to Buffalo, N.Y., or in any way violate section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1).

This petition for leave to intervene was not previously submitted because the State of New York has only recently been permitted to intervene. Moreover, the matter of an alleged violation of Section 3(1) was not seriously pressed by the Buffalo milling companies heretofore, as indicated in their brief to the hearing officer. The issue is first raised by New York's petition for reconsideration.

The proposed intervention by Commonwealth of Pennsylvania, so as to file the attached reply to petition for reconsideration will not unduly broaden the issues in this proceeding.

**WHEREFORE**, the Commission is requested to grant the intervention of Commonwealth of Pennsylvania, and that the attached reply be deemed filed.

Respectfully submitted,

ISRAEL PACKEL, Attorney General
Capitol Annex
Harrisburg, Pa. 17120

GORDON P. MacDOUGALL, Spec.Asst.Atty.Gen.
705 Ring Building
Washington, D.C. 20036

Attorneys for Commonwealth of Pennsylvania

October 22, 1974

## Certificate of Service

I hereby certify that I have this 22nd day of October, 1974, served a copy of the foregoing petition, and attached reply, upon all parties of record by first class mail postage-prepaid.

Washington, D.C. Gordon P. MacDougall

Before the

# INTERSTATE COMMERCE COMMISSION

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I. & S. Docket No. 8899

UNIT TRAIN RATES ON WHEAT,
MINN. & WISC., TO MARTINS CREEK, PA.

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# REPLY TO PETITION FOR RECONSIDERATION

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ISRAEL PACKEL, Attorney General
Capitol Annex
Harrisburg, Pa. 17120

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705 Ring Building
Washington, D.C. 20036

Attorneys for Commonwealth of
Pennsylvania

Due Date: October 22, 1974

Before the

INTERSTATE COMMERCE COMMISSION

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I. & S. Docket No. 8899

UNIT TRAIN RATES ON WHEAT,
MINN. & WISC., TO MARTINS CREEK, PA.

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## REPLY TO PETITION FOR RECONSIDERATION

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Commonwealth of Pennsylvania, by its Attorney General, submits this reply to the petition of New York State for reconsideration of the report and order of Division 2, entered June 18, 1974 (served July 18) in this proceeding. The report found proposed proportional rates on wheat, in the amount of 88 cents per 100 pounds, from the Twin Ports (Duluth, Minn.-Superior, Wis.) and from the Twin Cities (Minneapolis-St.Paul, Minn.), to Martins Creek, Pa., applicable during the period of closed navigation on the Great Lakes, to be just and reasonable and not otherwise unlawful.

We do not understand that New York State challenges the 88-cent rate.

The report also found a 72.25-cent rate from the Twin Ports, to Martins Creek, applicable during the season of open navigation on the Great Lakes, to be just and reasonable and otherwise lawful, but that the same rate from the Twin Cities to Martins Creek would violate section 3(1) of the Act, and was ordered cancelled.

It is our understanding that New York State contests the lawfulness of the 72.25-cent rate, and that the rate should be cancelled, as in violation of section 3(1), unless a rate is published from Twin Ports to Buffalo, N.Y. in the amount of 26.67 cents, which would be a reduction in the present rate of 43 cents per 100 pounds.

## Basis for the 72.25-cent Rate

The 72.25-cent all-rail rate was published to meet the competition of water-rail and water-truck routes between the Twin Ports and Martins Creek, Pa. The water segment is via the Great Lakes to Buffalo, N.Y., thence rail or truck beyond to Martins Creek. The 72.25-cent all-rail rate is constructed from a 26.67-cent lake transportation cost, 5 cents for elevation at Buffalo, and a 40-cent rail rate from Buffalo to Martins Creek.

The 88-cent all-rail rate was published to meet rail-water-rail, rail-water-truck, water-rail, and water-truck competition. A 43-cent rail rate applies from the Twin Ports and Twin Cities to Buffalo, 5 cents for elevation, and 40 cents per 100 pounds rail rate from Buffalo to Martins Creek.

Division 2 disapproved the 72.25-cent rate from Twin Cities origins to Martins Creek on the ground that the Twin Cities are 160 miles from water, such that the rate would unduly prefer the Twin Cities and would unduly prejudice the Twin Ports.

## Position of Pennsylvania

It is the position of Pennsylvania that the proposed 72.25-cent rate from the Twin Cities to Martins Creek is proper. A flour milling concern has located at Martins Creek. Other mills should be encouraged to locate in Pennsylvania. Mills in Pennsylvania should be allowed to compete with mills situated at Buffalo.

The 72.25-cent rate does not prefer Martins Creek and prejudice Buffalo.

The argument of New York State of prejudice to Buffalo is a belated effort, and was not seriously advanced during the hearings or on brief.

## I. THE CIRCUMSTANCES SURROUNDING TRANSPORTATION TO BUFFALO AND TO MARTINS CREEK ARE NOT SUBSTANTIALLY SIMILAR.

The 72.25-cent rate to Martins Creek was established to enable all-rail participation in the traffic, as opposed to water-rail or water-truck. The competition facing an all-rail rate to Buffalo is water competition. Apparently the 43-cent rail rate from Twin Ports to Buffalo will not secure the traffic during the period of open navigation in the fact of the 26.27-cent water cost. However, the 43-cent rate is on a lower level than the 72.25-cent rate to Martins Creek,[1] so that there is no prejudice to Buffalo. It may very well be that the railroads are unable to effectively compete against all-water transportation during the period of open navigation.

However, it is axiomatic that an all-rail rate to meet water-rail or water-truck competition is an entirely different situation from an all-rail rate designed to meet all-water competition. The circumstances are radically different.

The Commission can compel railroads, in meeting truck competition, to meet it equally at all points. Atchison, Topeka & Santa Fe Railway Co. v. United States, 218 F. Supp. 359 (N.D. Ill. 1963). This includes truck competition to a unified metropolitan area. Pennsylvania Railroad Company v. United States, 260 F. Supp. 536 (E.D. Pa. 1965).

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[1] The 43-cent rate yields apx. .038¢ per mile, whereas the 72.25-cent rate yields apx. .054¢ per mile for a longer distance.

On the other, hand, the types of competition sought to be met by the railroads here is water to Buffalo and water-rail to Martins Creek. Each combination of transportation has unique characteristics and different competitive aspects. There can be no violation of section 3(1) under such dissimilar conditions.

## II. THE SOO AND ERIE-LACKAWANNA DO NOT "CONTROL" THE BUFFALO RATE.

The State of New York asks for an alternative order, yet it is settled that the Soo Line and Erie-Lackawanna must control the present 43-cent rate in order for the Commission to issue an alternative order under section 3(1). See: New York Central Railroad Co. v. United States, 207 F. Supp. 483, 489-90 (S.D.N.Y. 1962).

## III. NO INJURY HAS BEEN SHOWN.

It is axiomatic that injury must be shown in order to establish a section 3(1) violation. Here, the wheat is moving through Buffalo to Martins Creek. The Buffalo interests would not be substantially injured if this water-truck movement is in part replaced by an all-rail movement, for the all-rail rate is no lower than necessary. The Buffalo milling interests have failed to establish any injury.

## CONCLUSION

The petition of New York State for reconsideration should be denied. The petition is an attempt to argue a section 3(1) issue which simply was not proven at the hearings, and was not seriously advanced heretofore.

It is established that Pennsylvania should have an opportunity to develop flour milling. Grain, Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (1964), sustained in State of New York v. United States, 256 F. Supp. 634 (W.D.N.Y. 1966), aff'd per curiam 386 U.S. 349 (1967).

Respectfully submitted,

ISRAEL PACKEL, Attorney General
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705 Ring Building
Washington, D.C. 20036

Attorneys for Commonwealth of
Pennsylvania

October 22, 1974

SERVICE DATE

AUG 5 1975

APPENDIX B

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2,
acting as an Appellate Division, held at its office in
Washington, D. C., on the 27th day of June, 1975.

INVESTIGATION AND SUSPENSION DOCKET NO. 8899

UNIT TRAIN RATES ON WHEAT, MINN, & WISC. TO MARTINS CREEK, PA.

Upon consideration of the record in the above-captioned proceeding including (1) the petitions for reconsideration of the report and order of Division 2, decided June 18, 1974, filed by the railroad respondents on September 30, 1974, and by the supporting intervenors, ConAgra, Incorporated, and the Chicago, Rock Island and Pacific Railroad Company on October 2 and September 11, 1974, respectively; and the replies thereto filed by International Association of Great Lake Ports and Seaway Port Authority of Duluth, jointly and by the Board of Trade of the City of Chicago on October 21, 1974, by protestant flour milling companies, Peavey Company, The Pillsbury Company, Standard Milling Company, ADM Milling Company, Ross Industries, Inc., and International Multifoods Corporation, jointly, on October 22, 1974, and by intervenor, State of New York, on October 22, 1974; (2) the petitions for reconsideration of the aforementioned report and order filed by protestants, Lake Carriers' Association on August 19, 1974, and Board of Trade of the City of Chicago on October 1, 1974, and by intervenor, State of New York, on October 2, 1974, and the replies thereto filed by the railroad respondents on October 21, 1974, and by the supporting intervenor, ConAgra, Incorporated, on October 22, 1974; (3) the petition for leave to intervene and file a tendered reply to the State of New York's petition for reconsideration filed by the Commonwealth of Pennsylvania on October 22, 1974, and the replies thereto filed by the Lake Carriers' Association on November 25, 1974, and by the Peavey Company, the Pillsbury Company, Standard Milling Company, ADM Milling Company, Ross Industries, Inc., and International Multifoods Corporation, jointly, on November 4, 1974; and

It appearing, That the sought intervention by the Commonwealth of Pennsylvania would not unduly broaden the issues herein nor delay the proceeding and thus conforms with the requirements of Rule 72 of the Commission's General Rules of Practice; therefore:

It is ordered, That the Commonwealth of Pennsylvania's petition to intervene be, and it is hereby, granted, that said petitioner be, and it, is hereby, permitted to participate in this proceeding as an intervenor in support of the respondents and that petitioner's tendered reply to the State of New York's petition for reconsideration be, and it is hereby, accepted for filing.

It is further ordered, That the petitions for reconsideration filed by protestants, Lake Carriers' Association and Board of Trade of the City of Chicago, and by intervenor, State of New York, be, and they are hereby, denied because sufficient grounds have not been presented to warrant granting the action sought.

And it is further ordered, That the petitions for reconsideration filed by the railroad respondents and by the supporting intervenors, ConAgra, Incorporated and the Chicago, Rock Island and Pacific Railroad Company, be, and they are hereby, granted and the proceeding is reopened on the present record.

By the Commission, Division 2, acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

*Served February 11, 1976*

30840

# INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8899

## UNIT TRAIN RATES ON WHEAT, MINN. & WIS. TO MARTINS CREEK, PA.

### INVESTIGATION AND SUSPENSION DOCKET NO. 8899

## UNIT TRAIN RATES ON WHEAT, MINN. & WIS. TO MARTINS CREEK, PA.

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*Decided January 27, 1976*

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Upon reconsideration, proposed unit-train rates on wheat from Minneapolis, Minnesota Transfer, St. Paul and Duluth, Minn., and Superior, Wis., to apply at different levels during the seasons of open and closed navigation on the Great Lakes, found just and reasonable and not otherwise unlawful. Proceeding discontinued.

APPEARANCES AS SHOWN IN THE PRIOR REPORT AND IN ADDITION:

*James E. Sykes* for the Chicago, Rock Island and Pacific Railroad Company, intervener in support of respondents.

*Louis A. Lefkowitz, Ruth Kessler Toch, Bryce Rea, Jr., and Patrick McEligot* for the State of New York, intervener in support of protestants.

*Israel Packel* and *Gordon P. MacDougall* for the Commonwealth of Pennsylvania, intervener in support of respondents.

### REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATE DIVISION.
COMMISSIONERS BROWN, MACFARLAND, AND CORBER

CORBER, *Commissioner:*

In the prior report, 346 I.C.C. 814, decided June 18, 1974, division 2 found that the proposed unit train rate on wheat from Minneapolis, Minnesota Transfer, and St. Paul, Minn. (Twin Cities), and Duluth, Minn., and Superior, Wis. (Twin Ports), to Martins Creek, Pa., to apply during the season of closed navigation on the Great Lakes, was just and reasonable and not otherwise unlawful; that the proposed lower unit-train rate on wheat from the Twin Ports to Martins Creek to apply during the season of open navigation was likewise lawful in all respects, but that the corresponding rate on the same level proposed to apply from the Twin Cities was unjust and unreasonable, unduly preferential to the Twin Cities and unduly prejudicial to the Twin Ports in violation of section 3(1) of the Interstate Commerce Act. The considered tariff schedule was ordered canceled without prejudice to the filing of a new schedule in conformity with the views expressed and findings made in the prior report.

Six petitions for reconsideration were filed: (1) jointly by the respondents, the Soo Line Railroad Company (Soo) and Erie Lackawanna Railway Company (Erie), (2) by ConAgra, intervener in support of respondents, (3) by the Chicago, Rock Island and Pacific Railroad Company (Rock Island), intervener in support of respondents, (4) by protestant Board of Trade of the City of Chicago, (5) by protestant Lake Carriers' Association, and (6) by the State of New York which was permitted to intervene in support of protestants. The protestant flour mills in Buffalo, N.Y., who actively compete with ConAgra in marketing flour in the eastern market, filed a joint reply to the petitions of the respondents, ConAgra and the Rock Island. Similar replies to the same petitions were filed by protestants, International Association of Great Lakes Ports and Seaway Port Authority of Duluth, jointly, by the Lake Carriers' Association, and by the State of New York. The protestant city of Chicago replied to the Rock Island's petition. Replies to the protestants' petitions for reconsideration were filed by the respondents, jointly, and by ConAgra. The Commonwealth of Pennsylvania was permitted to intervene and file a reply to New York's petition for reconsideration. Upon consideration of the record, including the petitions and replies, Division 2, Acting as an Appellate Division by order entered June 27, 1975, denied the petitions for reconsideration filed by the protestants and the State of New York, but granted the petitions for reconsideration filed by the respondent railroads and by the supporting interveners, ConAgra, Incorporated, and the Rock Island, and reopened the proceeding on the present record.

The statement of facts and positions of the parties in this highly controverted proceeding have been adequately recited in the prior report, and there has been no serious challenge to the statement. Accordingly, we adopt them as our own, and they will be restated only to the extent deemed necessary for clarity. After a careful review of division 2's report and order in the light of the arguments raised by the various petitioners and replicants, we adopt and affirm the findings and conclusions reached in the prior report in all respects except to the extent hereinafter indicated.

In issue are suspended unit-train proportional rates which became effective, as subsequently increased, on June 1, 1974, on wheat from the Twin Cities and Twin Ports to Martins Creek. Two levels of rates[1] were proposed: a 72.25-cent rate[2] during the open season of navigation over the Great Lakes and 88 cents during closed season. The proposal by the respondents was designed to give the supporting shipper, ConAgra, with milling facilities at Martins Creek, alternative all-rail year-round charges which approximate ConAgra's transportation and storage costs of obtaining grain from Buffalo. Wheat has been moving from the Twin Ports and Twin Cities to Buffalo at a unit-train rate (via the Erie to Chicago and the Soo, Penn Central Transportation Company, and other railroads beyond) at 43 cents. The Buffao unit-train rate is used almost exclusively to move wheat during the closed navigation season, as a much lower 1973 charge of 26.67 cents per hundredweight on wheat handled by nonregulated water carriers from Twin Ports to Buffalo was available. ConAgra's alternative transportation costs used in justification of the proposed open season and closed season unit-train rates are as described below:

I. Proposed open season rate of 72.25 cents:

(a) 26.67 cents—transportation by nonregulated water carriers from Twin Ports to Buffalo.

(b) 5.00 cents per hundredweight—cost of elevating grain at Buffalo.

(c) 40.00 cents—five-car rail rate published by Erie on wheat from Buffalo to Martins Creek.

(d) 71.67 cents—total.

II. Proposed closed season rate of 88 cents:

(a) 43 cents—Buffalo unit train rate from Twin Ports and Twin Cities.

(b) 5 cents per hundredweight—elevation charge at Buffalo.

(c) 40 cents*—Erie's five-car rate from Buffalo to Martins Creek.

(d) 88 cents—total.

* The proposal ignores an average charge of 35 cents for transporting wheat by non-regulated motor carriers from Buffalo to Martins Creek. Approximately 32 percent of ConAgra's total wheat volumes to Martins Creek moved from Buffalo in private carriages during the 7-month period from May through November 1973.

The proposal was opposed by six flour mills at Buffalo, the Penn Central which participates (from Chicago to Buffalo) in the Buffalo unit-train rate, water carrier interests, Duluth and other Great Lakes port interests, Buffalo and Chicago interests, and the county of Erie, N.Y. It is alleged that the proposal violates sections 1(5), 2, 3(1), 3(4), 4(1), and 15(a)(2) and (3) of the act. More specifically, the proposal is alleged to be unlawful because (1) it unduly prejudices Buffalo and Chicago while preferring Martins Creek in the merchandising of flour in the northern States in violation of section 3(1); (2) it fails to apply from Chicago, an origin intermediate point over the direct line of movement, in violation of sections 3(1) and 4(1); and (3) it ignores Twin Port's geographical advantage on the Great Lakes by extending the proposed rates to Twin Cities and, thus, is preferential to the latter, is unjust and unreasonable, and constitutes a destructive competitive practice. The respondents, Soo and Erie, and their supporting shipper, ConAgra, introduced evidence in support of the proposal. The cost evidence offered by the respondents and protestants show the proposal to be compensatory and division 2 so found.

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[1] Rates are stated in cents per 100 pounds unless indicated otherwise.

[2] Division 2's decision herein was prepared on the basis of the 72.25-cent rate although it recognized that as of June 1, 1974, the rate had increased to 78.25 cents. At the Ex Parte No. 305-A level, the open season rate is 89.25 cents.

As heretofore indicated, division 2 found the unit-train rates applicable during the closed navigation season and those applicable from the Twin Ports during the open navigation season just and reasonable and not otherwise unlawful. Sound reasons for these findings are given in the prior report and accordingly, we also find such rates to be just and reasonable and not otherwise unlawful.

In their petitions for reconsideration the respondents and their supporting interveners, ConAgra and the Rock Island, contend that division 2 erred in finding the proposed unit-train rate applicable from the Twin Cities during open navigation season to be unlawful. Division 2 found this rate violated section 3(1) of the act because it was at the same level as the Twin Ports water competitive rate and did not include the additional 15-cent cost of moving from Twin Cities to Twin Ports. Thus, the rate did not preserve the natural advantage of Twin Ports, 346 I.C.C. 854, 855.

The respondents and ConAgra claim that there is no sound legal or factual basis for Division 2's finding of a section 3(1) violation predicated on Twin Ports' geographical advantage being neutralized by extension of the navigation season rate to the Twin Cities. First, it is contended that there is no economic or competitive justification for depriving Twin Cities shippers of the right to store in transit and ship under the proposed proportional unit train rates wheat which is gathered from the same country stations and at the same rates as wheat which will move from the Twin Ports to Martins

Creek under the same proportional rates proposed herein. Secondly, the respondents and the intervening Rock Island contend that the disapproval of the Twin Cities rate could result in fourth section violations if the Burlington Northern Inc., and the Rock Island railroads elected to join in the proposed rates, as the Twin Cities would be intermediate to the Twin Ports and Chicago on the lines of both railroads.

The crux of respondents' position on reconsideration is that inclusion of the Twin Cities origin is justified by market competition, and numerous Commission decisions are cited in support, including *Pig Iron from New York Points to Detroit*, 296 I.C.C. 747, 752 (1955) (the *Pig Iron* case), where division 2 stated:

> *** Where reduced rates have been established from certain points to meet water competition, carriers serving other producing points may be authorized to meet the market competition thus created. *Soda Ash to Georgetown, S.C.*, 269 I.C.C. 475, 478.

Other Commission holdings of similar import also cited by respondents are: *Soda Ash to Georgetown, S.C.*, 269 I.C.C. 475, 478 (1947); *American Sugar Refining Co.* v. *Ahnapee & W. Ry. Co.*, 322 I.C.C. 717, 721 (1964); *Portland Freight Traffic Assn.* v. *Northern Pac. Ry.*, 337 I.C.C. 826, 831 (1970); *Wheat & Wheat Flour, Westbound*, 337 I.C.C. 858, 879 (1971); *Oil Country Iron or Steel Pipe, Midwest to Okla. & Tex.*, 326 I.C.C. 511, 523 (1966); *Sulphur, Canadian Origins to East St. Louis, Ill.*, 326 I.C.C. 288, 302 (1966); *Wine, Pacific Coast to Western, S.W. & Central States*, 321 I.C.C. 683, 711 (1964); and *Sugar to Ohio River Crossings*, 308 I.C.C. 167, 179 (1959).

In their reply statements the intervening State of New York and the protestants, Buffalo flour mills and International Association of Great Lakes Ports jointly with Seaway Port Authority of Duluth, attempt to distinguish the above decisions from the case at hand.

The State of New York argues that the *Pig Iron* case, which is relied on by respondents to support their "market competition" justification, holds at 296 I.C.C. 749, 752, that the proposed rail rates reduced to meet water competition "should not be lower than necessary to meet the competition." It is argued that the extension of the proposed rate to Twin Cities would violate this principle. New York also argues that since extension of the proposed rate to Twin Cities would unduly prejudice the Twin Ports (as found by division 2) and Buffalo, market competition cannot be used to justify a clear violation of the act, citing in support *Wheat & Wheat Flour, Westbound*, 337 I.C.C. 858, 880 (1971). This party attempts to distinguish the *Pig Iron* case on the ground that the origins in that case were "adjacent" (Niagara Falls, N.Y., is 20 to 30 miles from Buffalo) in contrast to the distance between Twin Ports and Twin Cities of approximately 160 miles. New York also points out that respondents and interveners rely on numerous "port equalization" cases in support of their market competition argument which are not in point since export rates may not properly be compared with domestic rates. See *Duluth Board of Trade v. Chicago & N.W. Ry. Co.*, 314 I.C.C. 695, 703 (1961). Similar arguments are made by the protestant port interests in their joint reply.

The protestant Buffalo flour mills attempt to distinguish the *Pig Iron* case from the instant proceeding on the ground the former involves radically dissimilar circumstances, including the fact that Twin Ports and Twin Cities are 160 miles distant, the fact that a new unit-train service is involved, and an allegation that there are proven violations of sections 1(5) and 3(1) of the act affecting the Buffalo mills and the port of Duluth. The Buffalo flour mills also attempt to distinguish (1) *American Sugar Refining* case, *supra*, as involving initial rail rate reductions prompted by intermodal competition, for a group of shippers in one territory (East), followed by later parallel reductions to the same markets predicated on "market competition"—for a separate group of shippers in a different origin territory (West); and (2) the *Portland* case, *supra*, as involving whether carriers can properly seek to overcome natural geographic disadvantages by rate action "not otherwise unlawful" (337 I.C.C. 831).

In our view, the various attempts by the protestants and New York to distinguish substantively the *Pig Iron* case and other cases relied on by the respondents are without merit. Those cases clearly stand for the proposition that where a carrier has reduced rates from one or more destinations to meet water competition, the market competition thus created serves as valid justification for similarly reduced rates from other origins to the same destinations. As pointed out by the protestants, this well-established principal has application only where the rate action sought is not otherwise unlawful. In this case, except for the possible preference sought to be justified on a competitive basis, the rates are clearly lawful and the market competition justification is applicable. Accordingly, there is no sound [illegible] for finding a section 3(1) violation predicated on Twin Ports' geographical advantage being neutralized by extension of the lower navigation season rate to the Twin Cities. Such a finding would effectively repudiate the well-established principle recognizing market competition as valid justification for water-related rates. The fact that the Twin Cities and the Twin Ports are 160 miles apart, a greater distance than in the *Pig Iron* case, is immaterial. To accept protestants' argument would deprive grain producers of the choice of marketing at Twin Cities or Twin Ports—a choice which has been preserved in the past by maintaining rate parity. In view of the showing of market competition justification, there is no sound basis for condemning the assailed navigation season rate from the Twin Cities as unjust and unreasonable or as a destructive competitive practice.

As previously indicated, New York and the protesting Buffalo flour mills contend that extension of the navigation season rate to the Twin Cities would unduly prejudice the Buffalo flour mills and unduly prefer their competitor, ConAgra, at Martins Creek, in violation of section 3(1) of the act. Inasmuch as the Buffalo unit-train rate is too high to move traffic during open navigation season, the Buffalo shippers are economically dependent upon lake vessel service from the Twin Ports to Buffalo during this season. The use of this service from the Twin Cities to Buffalo results in additional costs reflecting the local rail rate from the Twin Cities to the Twin Ports together with other incidental expenses. Thus, it is asserted that ConAgra would have, while Buffalo millers would not have, "the flexibility to buy grain on equal terms at either Twin Ports or Twin Cities, depending upon availability at any particular point in time." According to the protesting Buffalo mills, the effect would be to handicap them seriously in seeking to meet competition from ConAgra's Martins Creek mill in the important eastern territory, thus creating undue preference and prejudice prohibited under section 3(1).

Similar allegations of undue prejudice to Buffalo and undue preference to Martins Creek, resulting from application of the proposed navigation season rate from the Twin Ports, were made by the protesting Buffalo flour mills and again reiterated by the State of New York. Unlike Buffalo, Martins Creek now has a water-competitive rail rate during open season, which additional transportation alternative allegedly favors Martins Creek to the detriment of Buffalo in the following respects: (1) a Buffalo flour mill may be unable to obtain vessels when needed due to an unusually long season, (2) the Martins Creek mill can shop for the lowest rail or water-rail transportation cost, which option is not open to Buffalo millers, and (3) due to the inevitable lag respondents will experience in making adjustments in the water factor of the proposed rate and the effect of inflation, there will be periods of time when the proposed rate will fail to reflect the full extent of the water cost factor and thus give Martins Creek an unfair competitive advantage over Buffalo.

In the prior report division 2 dealt with these arguments as applied to the navigation season rate from the Twin Ports. It found that the proposed open and closed season rates from Twin Ports are structured as nearly as practical to equalize the alternative transportation costs as between Buffalo and Martins Creek and that bakers in eastern territory exercise a considerable degree of mobility in the purchase of flour, many floating from one producer to another, which suggests that factors other than transportation costs also influence mobility in the selection of flour distributors. At page 848 of the prior report division 2 stated:

> The marketing of flour is a competitive business with sales turning on as little as a cent or less difference per 100 pounds. The positioning of flour mills close to the markets they will serve is a policy of ConAgra, as well as the mills with which it competes. It is not the purpose of the act to equalize every producer's position in a given market. See *Wheat & Wheat Flour, Westbound*, 337 I.C.C. at 879-880.

The division went on to find that the proposed rate from the Twin Ports applicable during navigation season was not unduly prejudicial of Buffalo or otherwise unlawful. Although it did not reach the issue, we believe that a similar finding is warranted with respect to the proposed navigation season rate from the Twin Cities.

The argument of the State of New York that Buffalo flour millers may not be able to obtain vessels during the navigation season is speculative. We must deal in reasonable probabilities rather than possibilities or conjecture. See *Consolidation of Freight Forwarder Shipments*, 310 I.C.C. 191, 195 (1960). Division 2, therefore, correctly held at this contention was insufficient to invalidate the proposed rate for Twin Ports. The force of the contention is no different in regard to the proposed rate for Twin Cities than it is with respect to the proposed rate for Twin Ports. Similarly, the contentions that Martins Creek millers would have rail and water-rail options while Buffalo millers would be limited to water-rail rates and that the rail rates may lag in reflecting changes in competitive water rates acquire no more persuasive effect by extension of the navigation season rate to Twin Cities than they have for application of the rate of Twin Ports. In each instance the basis for these contentions is the same for Twin Cities as it is for Twin Ports. Since division 2 correctly found in its prior report that these arguments are not effective to show unlawfulness of the Twin Ports rate, they cannot show unlawfulness of the Twin Cities rate.

Buffalo's fundamental problem may be the lack of a lower level of unit-train rate from Buffalo to points in eastern territory. Although there is no basis on this record for prescribing such rates, the Buffalo millers have access to a competitive level of lake-rail rates from the Twin Ports which make them competitive with the Martins Creek mill in marketing flour in eastern territory. Moreover, the Buffalo mills have at Twin Ports competitive access to the country origins for Twin Cities as well as Twin Ports since transportation rates from the country origins both places are equalized. There is no showing on this record of any competitive injury to Buffalo mills resulting from their inability to reach Twin Cities during the navigation season at the same rates that they enjoy at Twin Ports or at rates comparable to those available to the Martins Creek mill. Thus, the fact that their access to Twin Cities is not equal to the Martins Creek mill is not such an economic impediment as to warrant condemnation of the proposed Twin Cities rate.

In this case there is a negligible cost differential for a unit train from Twin Cities and from Twin Ports; historically rates for these points have been equalized; both points generally serve the same country origins with rate equalization; and there is market competition between them. These are circumstances and conditions warranting rate equality for Twin Cities and Twin Ports. They do not, however, require rate equality for Buffalo and Martins Creek. The circumstances and conditions affecting each of those cities are dissimilar in regard to Twin Cities during the navigation season. The inability of Buffalo mills to obtain transportation from Twin Cities during that season on the same basis at the Martins Creek mill is not such an undue or unreasonable disadvantage as to contravene section 3(1) of the act. See *Consolidate of Forwarder Shipments, supra; Rates Between Baltimore and Washington*, 305 I.C.C. 14, 15-16 (1958); *Toilet Preparations to Middle Atlantic Territory*, 310 I.C.C. 528, 530 (1960); and *Routing Restrictions on Fresh Vegetables*, 335 I.C.C. 665, 671 (1969).

As division 2 found, the cost evidence of record clearly establishes that the proposed unit-train rates from the Twin Ports and Twin Cities during open and closed seasons of navigation are compensatory, and we adopt this finding. Division 2 also dismissed as being without merit various allegations that such proposed rates violate sections 1(5), 2, 3(1), 3(4), 4(1), and 15(a)(2) and (3) of the act. Sound reasons in support of division 2's findings and conclusions are set forth in the prior report, and we likewise adopt such findings and conclusions as our own. To the extent that they may be interpreted from division 2's report and order as applying only in connection with the rates approved therein, the reasoning underlying such findings and conclusions has equal application to the proposed Twin Cities rate applicable during open navigation season, and we find that such alleged violations of the act to the extent directed to the proposed Twin Cities rate are likewise without merit.

Upon reconsideration, we find the proposed unit-train rates from Twin Ports and Twin Cities to Martins Creek to be just and reasonable and not otherwise unlawful.

We further find that this decision is not a major Federal action adversely affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

*It is ordered,* That this proceeding be, and it is hereby, discontinued.

By the Commission, Division 2, Acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

2 Vol. 1 - PG

Respondent Soo Line Railroad Company
Exhibit No. __________
Witness: Ray H. Smith

Before The

INTERSTATE COMMERCE COMMISSION

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Transportation Authority
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UNIT TRAIN RATES ON )
WHEAT, MINNESOTA AND WISCONSIN )
TO MARTINS CREEK, PA. )

I&S Docket No. 8899

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# VERIFIED STATEMENT OF RAY H. SMITH

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Before The

INTERSTATE COMMERCE COMMISSION

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## UNIT TRAIN RATES ON WHEAT, MINNESOTA AND WISCONSIN TO MARTINS CREEK, PA.
(I & S DOCKET NO. 8899)

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## VERIFIED STATEMENT
OF
RAY H. SMITH

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My name is Ray H. Smith. I am Vice President-Traffic of the Soo Line Railroad Company. My business address is 1602 Soo Line Building, Minneapolis, Minnesota 55440. I have general supervision over the establishment of prices for transportation service on the Soo Line, the division of rates with other carriers, the freight sales staff, Intermodal Services and the Industrial Development Department. I have held my present position since July 1, 1972. Prior to that time, I held other positions in the Traffic Department of the Soo Line Railroad Company and its predecessor companies with supervisory responsibility for pricing, divisions and sales. I have been employed in the Traffic Department of the Soo Line or its predecessor companies for over 14 years.

Prior to joining the Soo Line, I was employed in the Transportation Department of the Pillsbury Company, commencing work as a Traffic Trainee with that company in 1949. Subsequently I was Traffic Manager of several of the Pillsbury flour mills and from 1954 until 1959 I was Assistant General Traffic Manager, working in the Pillsbury general offices in Minneapolis and responsible for the supervision of traffic functions at numerous flour mills. While employed by Pillsbury, I maintained a very close liaison with the Wheat Procurement Department with respect to transportation cost of wheat to flour mills. Through this liaison, I became familiar with wheat procurement patterns peculiar to particular flour mill locations in the Middlewest and the East.

## Description of Soo Line Railroad Company

The Soo Line Railroad operates 4,675 miles of railroad in the states of Illinois, Wisconsin, Upper Michigan, Minnesota, North Dakota, South Dakota and Montana. The lines of the Soo Line west of the Twin Cities and Twin Ports serve the important agricultural areas of Minnesota and the Dakotas. The Soo Line also operates mainlines west of the Twin Cities to points of connection with Canadian railroads at Noyes, Minnesota and Portal, North Dakota. These lines operate as important bridge lines for traffic moving to and from western Canada. East of the Twin Cities, the Soo Line serves a major pulp and paper producing complex in Wisconsin and Upper Michigan. The Soo Line operates lines eastbound from both the Twin Ports and Twin Cities to serve gateways ranging from Sault Ste. Marie, Michigan on the north to Chicago on the south. My Appendix 1 is a map of the entire Soo Line system.

Although the Soo has established, over the last ten years, a substantial diversification in its commodity mix, it is still significantly dependent on Farm Products, principally grain. In 1972, approximately 16% of its annual tonnage and 19% of its annual revenues derived from the movement of grain which was (1) gathered at country elevators located in the western areas of our railroad and delivered to terminal elevators at the Twin Cities or Twin Ports or (2) moved from those terminal elevators to Soo Line destinations east of the Twin Cities or (3) from those terminal elevators to Soo Line connections, destined east and south and to ports on the Atlantic seaboard and the Gulf of Mexico for export. (These figures also include some grain originated at country elevators in North Dakota and Montana which moved via connections to the West Coast ports for export.)

The importance of grain traffic to the Soo Line is reflected in my Appendix 2 attached hereto which sets forth for the years 1964 through 1972 (1) the total tons of grain handled by the Soo Line and revenues received therefrom, (2) tonnage and revenue statistics relating to grain moving from country elevators to Twin City and Twin Port terminal elevators, and (3) tonnage and revenue statistics relating to grain moving from the Twin City-Twin Port terminal elevators to points east and south of Chicago, Illinois. Most of the latter traffic moved under unit train or other volume rates.

The Soo Line has enjoyed modest profits in the last few years. However, it has enormous capital demands for plant improvement, including acquisition of new freight cars, which cannot be met without a substantial improvement in the profitability of its operations. The proposed Martins Creek Unit Train Rate will generate essential additional net income for the Soo Line when it is permitted to take effect. As shown by other testimony submitted in this proceeding, the Martins Creek operation will also contribute significantly to the profitability of the Erie's operations.

## The Protested Rate

Attached hereto as Appendix 3 is a copy of Soo Line Freight Tariff 543-B, ICC 7837, the rate publication suspended by the Commission in I&S Docket No. 8899. This publication, hereinafter referred to in this statement as the "Martins Creek" rate or the "protested" rate, names the Twin Cities and the Twin Ports as points of origin and Martins Creek, Pennsylvania as the point of destination.

The protested rate is subject to a minimum weight limitation of 190,000 pounds per car, an aggregate minimum weight of 5,000 tons per movement (train) and a minimum aggregate of three consecutive train movements per shipment. Normal terminal and transfer services, such as weighing, inspection, diversion or reconsignment will not apply in connection with this rate. In lieu of standard demurrage provisions, the rate is subject to 24 hours free time at origin and 36 hours free time at destination. Beyond this free time a special detention charge of $475.00 per train will be assessed at origin for each 24 hours or fraction thereof, and a charge of $9.50 per car will be assessed at destination for each 24 hours or fraction thereof.

The level of the proposed rate during the period of open navigation on the Great Lakes (April 1 - December 14*) is 72.25 cents per cwt. During the period of closed navigation (December 15 - March 31) the rate level will be 88 cents per cwt.

Pursuant to Special Permission Number 74-1051, the proposed rate has been made subject to a modified destination Rule 27 provision. The same permission waives the provisions of Tariff Circular 20 Rules (4 (i) and 7 insofar as Items 130 and 132 of Soo Line Tariff 543-B, ICC 7837 are concerned.

My Appendix 4 attached hereto compares the salient features of the protested rate publication and Soo Line Freight Tariff 526-I, I.C.C. No. 7755, a unit train grain tariff naming rates on wheat and other small grains moving from the identical origins named in the protested tariff to Buffalo, New York. The protested tariff publication was modeled, in large part, upon the Buffalo unit train grain tariff which the Commission found to be lawful in Wheat, in Multiple Car Shipments, Minnesota and Wisconsin to Buffalo, New York, I.C.C. Docket No. 34381. However, certain adaptations of the Buffalo tariff were made, primarily at the insistence of the respondents. Thus, for example, the Buffalo unit train tariff does not require a shipper to book three consecutive trains per "shipment," as does the protested publication.

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* The present tariff expires on September 15, 1974. However, once its lawfulness is established it may be renewed on a year-to-year basis.

While the protested rate, as was also the case with respect to the Buffalo unit grain train rate, is designed primarily to attract to respondents a very limited volume of wheat which can and does move over the Great Lakes from the Twin Ports to Buffalo, both of these rates are also made applicable from the Twin Cities as well as Twin Port elevators.

The Twin Cities origins were included in the Buffalo unit train publication at the specific request of the Buffalo millers most of whom have elevators capable of loading unit trains at both the Twin Ports and the Twin Cities.

Historically, grain rates to the Twin Cities and the Twin Ports from most country origins and grain rates from both terminal areas to the Gulf ports, Atlantic ports, and points throughout official territory have been equalized. Thus, to illustrate, my Appendix No. 5 identifies numerous grain tariffs establishing identical rates from the Twin Cities and the Twin Ports to various destinations.

As early as 1934 in the Docket 17,000, Part VII proceedings, Grain and Grain Products, 205 ICC 301, the Commission prescribed grain rate equalization for the Twin Ports and the Twin Cities with respect to inter-market proportional rates to Chicago, Peoria, and St. Louis. In the Buffalo Unit Train case, Docket 34381, Examiner Boisseree noted that "To maintain normal rate relations between Duluth, the Twin Cities including Minnesota Transfer, and Superior, the unit train rate was published from the other origins". (Examiner's Report, p. 14).

It should be noted, in this connection, that if and when other railroads operating between the Twin Ports and Chicago join in publishing the Martins

Creek rate, the Twin Cities will be intermediate points for those railroads with respect to trains moving from Duluth-Superior via Chicago to Martins Creek.

## Economic Background of Grain Transportation From North Central to Eastern Region of the United States

Historically, Buffalo, New York, has been the largest flour milling complex in the United States. Its predominant position in the flour milling market has been maintained in recent years. This position is the result of two major advantages. First, the Buffalo flour mills, unlike many of their principal competitors, are located adjacent to the major flour consuming market in the United States; namely, the North Atlantic states. Second, geographic location permits Buffalo mills to draw wheat from all of the principal producing areas.

The two primary types of wheat are (1) hard red winter wheat, produced in the states of Texas, Oklahoma, Kansas, Nebraska and Colorado and (2) hard northern spring wheat, produced in the states of Minnesota, North Dakota, South Dakota and Montana. Wheat from the former area generally moves through the primary markets of Kansas City or Omaha. Hard northern spring wheat for milling at Buffalo moves through the primary market at Duluth, Minn. Historically, spring wheat purchased by Buffalo mills has moved beyond Duluth by water transportation on the Great Lakes. This transportation is exempt from Interstate Commerce Commission regulation under the bulk commodity exemption contained in Section 303, Part III of the Interstate Commerce Act. Prices for water transportation vary and fluctuate according to relative supply of equipment and demand for transportation.

The availability of this unregulated water transportation is the most important economic factor explaining Buffalo's position as the nation's ranking milling center. The milling capacity at Buffalo and the enormity of the eastern spring wheat flour market served by Buffalo result in a tremendous movement of spring wheat via lake vessels from the Twin Ports to Buffalo. As shown by Table I below, approximately 47.5 million bushels of wheat move annually from the Twin Ports to flour mills located on the Great Lakes via water transportation. Table I also demonstrates the extent to which the Buffalo mills dominate the market insofar as flour produced from spring wheat is concerned.

Table I

LAKE SHIPMENTS OF DOMESTIC WHEAT FROM DULUTH-SUPERIOR FOR YEARS SHOWN (in bushels)

| YEAR | BUFFALO TONNAGE | TOTAL TONNAGE |
|---|---|---|
| 1965 | 44,192,000 | 46,979,000 |
| 1966 | 51,826,000 | 57,821,000 |
| 1967 | 36,736,000 | 40,810,000 |
| 1968 | 40,730,000 | 44,151,000 |
| 1969 | 44,072,000 | 48,310,000 |
| 1970 | 43,814,000 | 47,572,000 |
| 1971 | 47,082,000 | 47,714,000 |
| 1972 | 45,058,000 | 45,322,000 |

Source: DULUTH BOARD OF TRADE ANNUAL REPORTS

Prior to 1964 exempt water transportation charges were at such a level as to preclude rail carriers from participation in the transportation of wheat moving from Duluth to Buffalo. Rail carriers were a standby mode, occasionally moving nominal tonnages during the winter months but only when wintertime demand for spring wheat exceeded prior estimates and flour mills could not await availability of water transportation commencing in April of each year.

In December, 1963, the single car all-rail wheat freight rate from Duluth to Buffalo was 72½¢ per cwt., approximately three times higher than the average charge assessed by the exempt water carrier for transporting wheat between the same points.

In January, 1964, respondent Soo Line herein and others attempted to compete with the unregulated water carriers for a small portion of the wheat which historically had moved from Duluth to Buffalo via water. This competitive effort involved publication of a unit train rate of 33½¢ per cwt., approximately 54 percent lower than the then existing single car rate.

Before publishing the Buffalo unit train rate, the railroads made a thorough evaluation of total costs incidental to the transportation of wheat by water and they determined that a small portion of the Great Lakes tonnage could be diverted to rail movement, displacing some of the wheat which the millers were required to store in Buffalo elevators during the season of each year when the Great Lakes were frozen over. The railroads realized at that time that they could not compete effectively with the unregulated water carriers for transportation of grain moving from Duluth to Buffalo during the navigation season.

Effective January 8, 1964, the Soo Line and the Pennsylvania Railroad Company published the unit train rate referred to above in Soo Line Freight Tariff 526-B, ICC 7633. This rate was the subject of numerous suspension petitions filed by many of the interests seeking suspension of the instant rate, and others. As I have previously noted, in the face of these protests the Commission refused to suspend the Duluth-Buffalo unit train rate and in Wheat in Multiple Car Shipments, Minn. & Wis. to Buffalo, Docket No. 34381 (unreported) the Commission found the Duluth-Buffalo unit train rate was "just, reasonable and not otherwise unlawful."

The Duluth-Buffalo unit train rate accomplished, in part, its limited purpose of displacing a portion of the winter storage wheat which had previously moved over the Great Lakes. Thus, to illustrate, during the years 1969-1973 an approximate average of 6.7 million bushels of wheat moved annually under the unit train rate. This volume was slightly less than the amount of wheat moved over the Great Lakes and held in winter storage during this three-year period.

The Buffalo unit train rate fulfilled none of the dire predictions of those seeking its suspension that its publication would destroy the shipping capacity of Great Lakes carriers, would cause widespread unemployment and would entirely disrupt the eastern territory marketing of flour produced in eastern and central United States regions.

To the contrary, the facts are:

(1) The Buffalo unit train rate has moved an average of 6.7 million bushels of grain per year which would otherwise move by water, approximately 10% of the 65,000,000 bushels of grain moving annually over the Great Lakes in domestic service. The Martins Creek unit train rate will move an additional 2.1 million bushels of wheat which would otherwise move in unregulated vessels to Buffalo. Again, this represents approximately 3% of the

total domestic grain tonnage moving annually over the Great Lakes and belies the suggestion of unregulated water carrier interests that the Martins Creek rate will cripple their capacity to move grain and other exempt commodities and that thousands of Buffalo based laborers will lose employment.

(2) Because the Buffalo unit train rate merely met the alternative costs available to Buffalo mills by unregulated carriage there is no way it could have affected the market price of flour laid down in New York, Philadelphia, and other large eastern population centers. The Buffalo millers' ability to market flour at a given price level was determined primarily by their water transportation costs and the sole question raised by publication of the Duluth-Buffalo unit train rate was whether or not a small portion of that traffic would move pursuant to a regulated unit train rate, reflecting approximately the same costs as those involved in lake transportation and winter storage of Duluth wheat.

The Buffalo unit train tariff has remained in effect in substantially the same form as originally published, but expanded to include other small grains, for approximately ten years. The present rate at the Ex Parte 299 level is 43¢ per cwt. However, it has been called to my attention that some unit train wheat has moved to Buffalo in the fall of 1973 at a transit rate level of 41¢ per cwt.

## Background of Proposed Rates

In the fall of 1972 the Soo Line and Erie published an annual volume (100,000 tons) unit train rate on wheat at a 62.5 cent cwt. level between the origins and destinations covered by the protested rate. This rate was published at the request of ConAgra, Inc., a large flour milling firm which had recently established a new flour milling facility at Martins Creek, Pa. Following the filing of protests to the 62.5 cent rate by numerous parties, and responses thereto being filed by respondents and ConAgra, the Board of Suspension voted not to suspend or investigate said rate.

Subsequently, the Suspension Board's decision was reversed by Division II in Wheat, Annual Volume Rate, Minn. and Wisc. to Martins Creek, Pa., I&S Docket No. 8784. Shortly thereafter, the proposed rate was withdrawn and the investigation proceedings were discontinued.

In the spring and summer of 1973 respondents and ConAgra resumed discussions looking toward the publication of a new unit train rate which would be attractive to both respondents and ConAgra.

## The Protested Rate Merely Meets ConAgra's Alternative Transportation Costs

To be attractive to ConAgra, the proposed rate must approximate the transportation costs which it incurs in moving wheat from the Midwest to Martins Creek via alternative means of transportation available to that company. It is relatively simple to determine what those transportation costs are, although the "rates" charged by the Great Lakes carriers are actually negotiated prices which are exempt from regulation by the Interstate Commerce Commission and are not published by the exempt water carriers. Nevertheless, it was generally recognized in the spring of 1973, and confirmed by our investigations, that the water carriers were charging up to 16 cents per bushel or 26.67¢ per cwt. for transporting wheat from Duluth-Superior to Buffalo. The elevation costs which ConAgra incurs at Buffalo amount to 5 cents per cwt. and the special five-car rate available to ConAgra to move wheat from Buffalo to Martins Creek is 40¢ per cwt. A combination of these factors produces a transportation cost to ConAgra for moving wheat from the Head-of-the-Lakes to Martins Creek of 71.67 cents. (I am advised this cost is reduced by over 3¢ per cwt. if the Buffalo-Martins Creek leg of the through movement is handled by exempt motor carriers.) In any event, ConAgra advised respondents that it would use unit trains to move wheat from the Midwest to Martins Creek if the rate available to it during the Great Lakes navigation season did not exceed 72.25 cents per cwt.

During the non-Great Lakes navigation season, ConAgra can move wheat from the Twin Cities or the Twin Ports to Martins Creek via rail or a rail-truck operation by combining the Buffalo unit train rate (43¢ per cwt.) with a 5¢ per cwt. elevation charge at Buffalo and the 40¢ per cwt. rate from Buffalo to Martins Creek. Again, ConAgra's cost would be reduced by using exempt motor carriers to move the grain from Buffalo to Martins Creek. In any event, once again, ConAgra advised respondents that it would use the unit train service proposed by the Soo Line and Erie during the non-navigation season if the rate established for that service during that season did not exceed 88¢ per cwt.

## The Proposed Rate is Highly Attractive to the Soo Line

Mr. Crandall's cost study which is being submitted in evidence in this case shows that the Soo Line revenues generated by the proposed rate (at the lower 72.25¢ level) will exceed our variable costs by approximately 5.4¢ per cwt., $111.00 per car, and $5,550.00 per train. Thus, viewed in an absolute sense, the proposed rate is obviously highly profitable and attractive to the Soo Line. I am advised the Erie's cost study reflects a similarily profitable operation for its railroad when its divisions of the through rate are compared with its variable cost of handling unit trains from Chicago to Martins Creek, Pennsylvania.

A comparison of revenues generated by the protested rate with Soo Line and Erie revenues generated by the Buffalo unit train rate for performing the identical service (Soo Line) or comparable service (Erie) demonstrates, once again, why the protested rate is deemed to be highly attractive to the respondents. The following Tables compare the total revenues per cwt., per car and per train generated by the 43 cent per cwt. Buffalo rate and the bi-level Martins Creek rate (72.25 cents per cwt. during 8½ months and 88 cents per cwt. during 3½ months):

## TABLE II*

### Respondents Total Revenue

| | Per Cwt. | Per Car | Per Train |
|---|---|---|---|
| (1) Duluth, Mn., to Buffalo, N. Y.** | 43.00 | $ 877.20 | $ 43,860.00 |
| (2) Duluth, Mn., to Martins Creek, Pa. | | | |
| Proposed 4/1/74 to 9/15/74 | 72.25 | 1,473.90 | 73,695.00 |
| Proposed 12/15/73 to 3/31/74 | 88.00 | 1,795.20 | 89,760.00 |

(1) Item 130-A, Soo Line F.T. 526-I, I.C.C. 7755
(2) Item 140, Soo Line F.T. 543-B, I.C.C. 7837

Table II demonstrates the fact that the proposed rate is published at a level which will return to respondents collectively 68% more revenue at the

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* Tables II - IV assume a movement of 5,100 tons in a 50-car train.

** To the extent the Buffalo movement involves transit billing, the Buffalo revenue figures in Tables II - IV are slightly overstated (see page 11, supra).

72.25¢ level and over 100% more revenue at the 88¢ level than does the Buffalo rate which the Commission found to be compensatory in Docket No. 34381.

Tables III and IV below compare the Soo Line and the Erie per cwt., per car, and per train revenues generated by the 43 cent per cwt. Buffalo rate and the bi-level proposed rate.

## TABLE III

### Soo Line Revenue

| | Per Cwt. | Per Car | Per Train |
|---|---|---|---|
| (1) Duluth, Mn., to Buffalo, N.Y. | 17.2¢ | $ 350.88 | $17,544.00 |
| (2) Duluth to Martins Creek, Pa. | | | |
| Proposed 4/1/74 to 9/15/74 | 25.2875¢ | 515.87 | 25,793.50 |
| Proposed 12/15/73 to 3/31/74 | 30.8¢ | 628.32 | 31,416.00 |

(1) Based upon Soo Line division of 40% of thru rate.
(2) Based on Soo Line division of 35% of thru rate.

## TABLE IV

### Erie Revenue

| | Per Cwt. | Per Car | Per Train |
|---|---|---|---|
| (1) Duluth, Mn. to Buffalo, N.Y. | 25.8¢ | $ 526.32 | $ 26,316.00 |
| (2) Duluth to Martins Creek, Pa. | | | |
| Proposed 4/1/74 to 9/15/74 | 46.9625¢ | 958.03 | 47,901.50 |
| Proposed 12/15/73 to 3/31/74 | 57.2¢ | 1,166.88 | 58,344.00 |

(1) Based upon Erie division of 60% of thru rate.
(2) Based upon Erie division of 65% of thru rate.

Table III reveals the fact that the Soo Line will receive 8¢ more per cwt., $164.99 more per car, and $8,249.50 more per train in performing a given transportation service under the 72.25 cents Martins Creek rate than it presently receives for performing the identical transportation service under the 43 cent Buffalo rate. The Soo Line increment for performing the identical service under the 88¢ rate would be respectively 13.6¢ per cwt., $277.44 per car, and $13,872.00 per train. Assuming the Soo Line handled nineteen Martins Creek unit trains under the 72.25¢ rate and two trains under the 88¢ rate, which would be the approximate number of trains required to meet ConAgra's Martins Creek annual wheat requirements, the incremental revenue received by the Soo Line would exceed $184,000.00.

The fact that the protested rate is highly attractive to both the Soo Line and Erie is further demonstrated by my Appendix No. 5 attached hereto. Appendix 5 compares the rate charged and the ton mile earnings generated by the protested rate with the rates and ton mile earnings realized by respondents and other railroads in connection with the Buffalo Unit Train Rate and various export grain rates from the Twin Ports and the Twin Cities to New Orleans, Louisiana, Baltimore, Maryland and Norfolk, Virginia. The Soo Line and other railroads operating in the territories involved handle substantial volumes of grain moving under each of the rates set forth in this Exhibit.

Appendix 5 also shows that the Martins Creek rate, even at the 72.25 cent level, exceeds each of the export rates shown thereon by amounts ranging from .25¢ per cwt. to 7.25¢ per cwt. even though the mileage from Duluth or Minneapolis to Martins Creek is less than the mileage from those origins to each of the ports shown on said exhibit. Accordingly, as shown by Appendix 5 the ton mile earnings generated by the protested rate exceed substantially the ton mile earnings which respondents and other railroads received for handling export grain traffic moving through the ports of New Orleans, Baltimore, and Norfolk.

## Conclusion

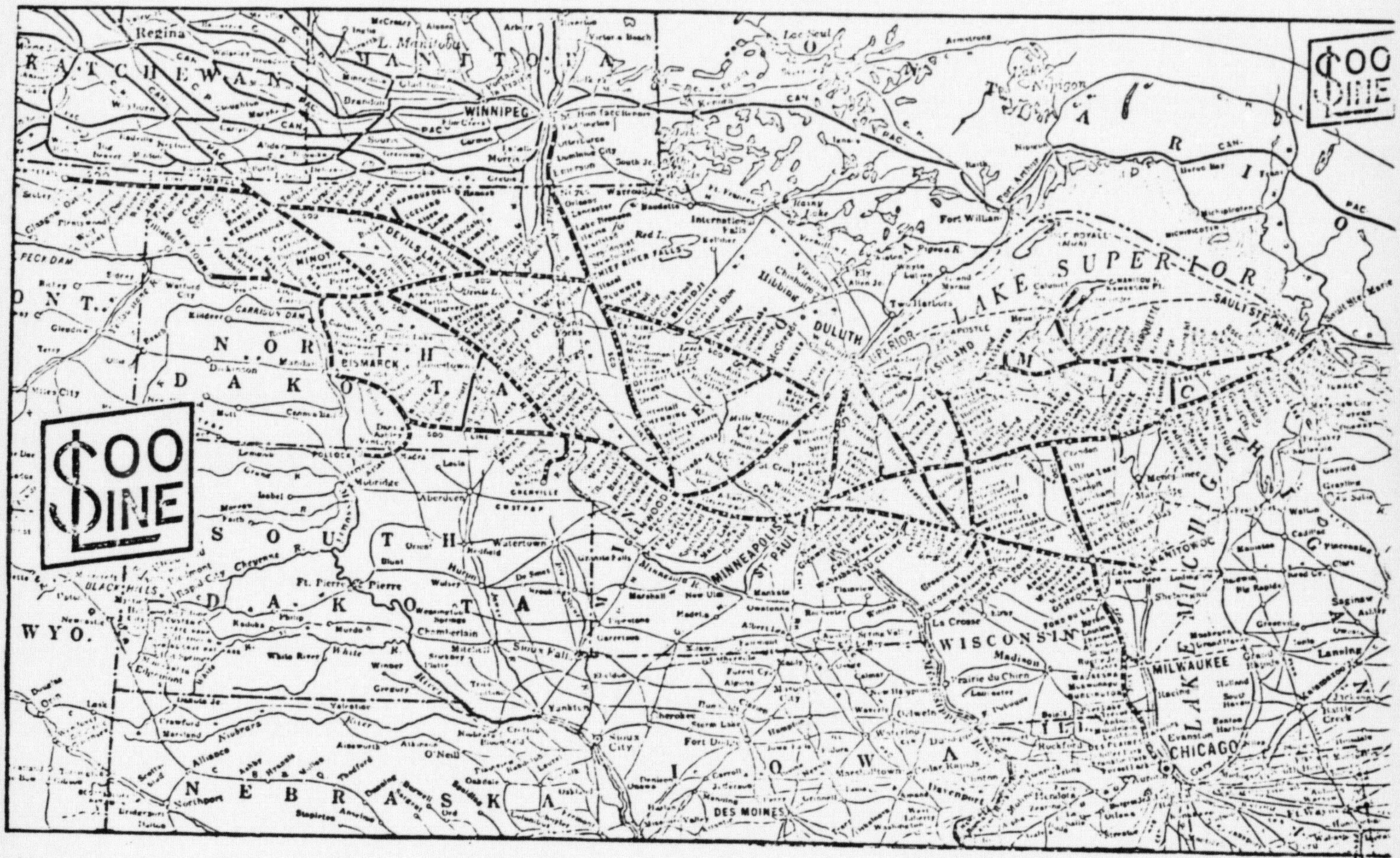
In my opinion, the protested rate, when approved, will permit respondents to handle profitably a limited but well defined volume of traffic which presently moves from the Midwest to Martins Creek, Pennsylvania via alternative routes or modes of transportation. The rate was designed by respondents to be no lower than necessary to be attractive to the supporting shipper, ConAgra, Inc.

Because the protested rate merely meets or exceeds the alternative transportation cost available to ConAgra there is no way it could affect the market price of flour laid down in New York, Philadelphia and other large eastern population centers.

In my opinion the protested tariff publication is unambiguous. If the Commission decides for any reason that specific provisions of the protested tariff are unclear, respondents are willing to make whatever revision of the publication the Commission may deem necessary to resolve such ambiguities or otherwise to comport in all respects with the provisions of Section VI of the Interstate Commerce Act.

In my opinion the protested publication does not violate the provisions of Section IV of the Act. Once again, if the Commission decides otherwise, respondents are willing to amend the protested publication in whatever manner is required to meet Section IV proscriptions. In this connection I would merely note that the Commission's approval of the Buffalo unit train rate, in Docket No. 34381, supports my opinion that the protested publication does not violate Section IV.

## SOO LINE RAILROAD


SOO LINE
SOO LINE
Regina
KATCHEWAN
MANITOBA
L. Manitoba
Brandon
WINNIPEG
Lac Seul
Lake Nipigon
Fort William
Port Arthur
ONTARIO
LAKE SUPERIOR
SAULT STE MARIE
International Falls
Hibbing
Virginia
DULUTH
SUPERIOR
ASHLAND
Two Harbors
MINOT
DEVILS LAKE
BISMARCK
NORTH DAKOTA
Dickinson
Miles City
SOUTH DAKOTA
Aberdeen
Watertown
Huron
Pierre
Rapid City
BLACK HILLS
Chamberlain
Mitchell
Sioux Falls
Yankton
WYO.
MINNEAPOLIS
ST. PAUL
Mankato
Rochester
WISCONSIN
La Crosse
Madison
Prairie du Chien
MANITOWOC
MILWAUKEE
LAKE MICHIGAN
MICHIGAN
Escanaba
Marquette
Lansing
Saginaw
Battle Creek
CHICAGO
Evanston
Gary
IOWA
Sioux City
Fort Dodge
Marshalltown
Cedar Rapids
Dubuque
Davenport
Clinton
Rockford
DES MOINES
NEBRASKA
O'Neill
Alliance

Appendix

BEST COPY AVAILABLE

## SOO LINE RAILROAD COMPANY

### Grain Statistics
(Tons and Revenues)

| Year | Total |  | From Country to Twin Cities and Twin Ports |  | From Twin Cities & Twin Ports to Off-line Eastern and Southern Destinations |  |
|---|---|---|---|---|---|---|
|  | Tons | Revenue | Tons | Revenue | Tons | Revenue |
| 1964 | 2,500,290 | $16,898,485 | 1,579,892 | $12,805,065 | 252,632 | $ 866,460 |
| 1965 | 2,454,802 | 16,026,278 | 1,469,676 | 11,530,189 | 218,382 | 731,557 |
| 1966 | 2,877,617 | 20,153,001 | 1,923,971 | 15,704,549 | 264,766 | 913,934 |
| 1967 | 2,146,904 | 13,155,202 | 1,191,201 | 9,061,155 | 303,220 | 992,395 |
| 1968 | 2,041,859 | 13,254,506 | 1,170,466 | 9,386,694 | 248,226 | 898,184 |
| 1969 | 2,618,408 | 16,853,351 | 1,404,127 | 11,145,388 | 343,618 | 1,229,041 |
| 1970 | 2,763,280 | 20,678,574 | 1,605,821 | 14,378,029 | 317,748 | 1,170,261 |
| 1971 | 2,568,219 | 19,419,669 | 1,511,878 | 13,717,759 | 346,110 | 1,485,688 |
| 1972 | 3,792,453 | 26,902,753 | 2,348,343 | 19,114,137 | 551,681 | 2,199,143 |

Source: Company Records

Appendix 2

SUPPLEMENT TO

I. C. C. 7837

SUPPLEMENT 1 TO
SOO LINE FREIGHT TARIFF 543-B
SUPPLEMENT 1 - SUSPENSION SUPPLEMENT (I.C.C. I&S DOCKET NO. 8899) WHEAT, ANNUAL VOLUME RATE, MINN. & WIS. TO MARTINS CREEK, PA.

SUSPENDING

# SOO LINE RAILROAD COMPANY

IN CONNECTION WITH

ERIE LACKAWANNA RAILWAY COMPANY

## JOINT AND PROPORTIONAL TARIFF

----NAMING RATES ON ----

WHEAT, IN BULK

| FROM | TO |
|---|---|
| DULUTH, MINN.<br>MINNEAPOLIS, MINN.<br>MINNESOTA TRANSFER, MINN.<br>ST. PAUL, MINN.<br>SUPERIOR, WIS. | MARTINS CREEK, PENNSYLVANIA |

UNIT TRAIN GRAIN TARIFF

## SUSPENSION NOTICE

WHEAT, ANNUAL VOLUME RATE, MINN. & WIS. TO MARTINS CREEK, PA.
(I.C.C. I&S DOCKET NO. 8899)

NOTICE
THE PROVISIONS PUBLISHED HEREIN WILL, IF EFFECTIVE, NOT RESULT IN ANY SIGNIFICANT EFFECT ON THE QUALITY OF THE HUMAN ENVIRONMENT.

ISSUED NOVEMBER 12, 1973
ISSUED UNDER AUTHORITY OF RULE 9 (K) OF TARIFF CIRCULAR NO. 20 AND IN COMPLIANCE WITH ORDER OF THE INTERSTATE COMMERCE COMMISSION IN I&S DOCKET NO. 8899.

ISSUED BY
M. M. BEYER
MANAGER, COMMERCE & TARIFFS
SOO LINE RAILROAD COMPANY
SOO LINE BUILDING
MINNEAPOLIS, MINNESOTA 55440

SUPPLEMENT 1 TO SOO FREIGHT TARIFF 543-B

## ORDER

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 2, ACTING AS AN APPELLATE DIVISION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 31ST DAY OF OCTOBER, 1973.

INVESTIGATION AND SUSPENSION DOCKET NO. 8899

UNIT TRAIN RATES ON WHEAT, MINN. & WISC. TO MARTINS CREEK, PA.

IT APPEARING, THAT THERE HAVE BEEN FILED WITH THE INTERSTATE COMMERCE COMMISSION TARIFF SCHEDULES SETTING FORTH NEW REDUCED RATES AND CHARGES, AND NEW RULES, REGULATIONS AND PRACTICES AFFECTING SUCH RATES AND CHARGES, APPLICABLE ON INTERSTATE OR FOREIGN COMMERCE, TO BECOME EFFECTIVE NOVEMBER 1, 1973, DESIGNATED AS FOLLOWS:

SOO LINE RAILROAD COMPANY:
TARIFF 543-B, I.C.C. 7837;

AND IT FURTHER APPEARING, THAT UPON CONSIDERATION OF THE SAID SCHEDULES AND PROTESTS THERETO THERE IS REASON TO BELIEVE THAT THEY WOULD, IF PERMITTED TO BECOME EFFECTIVE, RESULT IN RATES AND CHARGES, RULES, REGULATIONS OR PRACTICES WHICH WOULD BE UNJUST AND UNREASONABLE IN VIOLATION OF THE INTERSTATE COMMERCE ACT; AND GOOD CAUSE APPEARING THEREFOR:

IT IS ORDERED, THAT AN INVESTIGATION BE, AND IT IS HEREBY, INSTITUTED INTO AND CONCERNING THE LAWFULNESS OF THE RATES, CHARGES, AND REGULATIONS CONTAINED IN SAID SCHEDULES, WITH A VIEW TO MAKING SUCH FINDINGS AND ORDERS IN THE PREMISE AS THE FACTS AND CIRCUMSTANCES SHALL WARRANT. IN THE EVENT THE SAID SCHEDULES ARE CHANGED, AMENDED OR REISSUED UPON TERMINATION OF THE SUSPENSION PERIOD AND THE INVESTIGATION HAVING NOT BEEN CONCLUDED, SUCH CHANGED, AMENDED OR REISSUED SCHEDULES WILL BE INCLUDED IN THIS INVESTIGATION.

IT IS FURTHER ORDERED, THAT THE OPERATION OF THE SAID SCHEDULES BE AND IT HEREBY IS SUSPENDED, AND THAT THE USE THEREOF ON INTERSTATE AND FOREIGN COMMERCE BE DEFERRED TO AND INCLUDING MAY 31, 1974, UNLESS OTHERWISE ORDERED BY THIS COMMISSION.

IT IS FURTHER ORDERED, THAT THE INVESTIGATION IN THIS PROCEEDING SHALL NOT BE CONFINED TO THE MATTERS AND ISSUES HEREIN-BEFORE STATED AS THE REASON FOR INSTITUTING THIS INVESTIGATION, BUT SHALL INCLUDE ALL MATTERS AND ISSUES WITH RESPECT TO THE LAWFULNESS OF THE SAID SCHEDULES UNDER THE INTERSTATE COMMERCE ACT.

IT IS FURTHER ORDERED, THAT NEITHER THE SCHEDULES HEREBY SUSPENDED NOR THOSE SOUGHT TO BE ALTERED THEREBY SHALL BE CHANGED UNTIL THIS PROCEEDING HAS BEEN DISPOSED OF OR UNTIL THE PERIOD OF SUSPENSION HAS EXPIRED, UNLESS OTHERWISE ORDERED BY THE COMMISSION.

AND IT IS FURTHER ORDERED, THAT A COPY OF THIS ORDER BE FILED WITH THE SCHEDULES IN THE OFFICE OF THE INTERSTATE COMMERCE COMMISSION, AND THAT COPIES HEREOF BE SERVED UPON THE CARRIERS PARTIES TO THE SAID SCHEDULES AND THAT THE SAID CARRIERS BE, AND THEY ARE HEREBY, MADE RESPONDENTS TO THIS PROCEEDING.

BY THE COMMISSION, DIVISION 2 ACTING AS AN APPELLATE DIVISION.

ROBERT L. OSWALD
SECRETARY

(SEAL)

## SUSPENSION NOTICE

THE EFFECTIVE DATE OF SOO LINE RAILROAD COMPANY, I.C.C. 7837 IS HEREBY SUSPENDED TO AND INCLUDING MAY 31, 1974.

PENDING RESTORATION, REISSUE OR CANCELLATION THEREOF NO SIMILAR RATES ARE IN EFFECT.

THE END

ALL RATES IN THIS TARIFF ARE REDUCTIONS

I. C. C. 7837

SOO LINE FREIGHT TARIFF 543-B

# SOO LINE RAILROAD COMPANY

IN CONNECTION WITH

ERIE LACKAWANNA RAILWAY COMPANY

## JOINT AND PROPORTIONAL TARIFF

——NAMING RATES ON——

WHEAT, IN BULK

| FROM | TO |
|---|---|
| DULUTH, MINN.<br>MINNEAPOLIS, MINN.<br>MINNESOTA TRANSFER, MINN.<br>ST. PAUL, MINN.<br>SUPERIOR, WIS. | MARTINS CREEK, PENNSYLVANIA |

UNIT TRAIN GRAIN TARIFF

GOVERNED, EXCEPT AS OTHERWISE PROVIDED HEREIN BY UNIFORM FREIGHT CLASSIFICATION 11, I.C.C. 7, UNIFORM CLASSIFICATION COMMITTEE, AGENT.

NOTICE
THE PROVISIONS PUBLISHED HEREIN WILL, IF EFFECTIVE, NOT RESULT IN ANY SIGNIFICANT EFFECT ON THE QUALITY OF THE HUMAN ENVIRONMENT.

ISSUED SEPTEMBER 28, 1973 EFFECTIVE NOVEMBER 1, 1973

ISSUED BY
M. M. BEYER
MANAGER, COMMERCE & TARIFFS
SOO LINE RAILROAD COMPANY
SOO LINE BUILDING
MINNEAPOLIS, MINNESOTA 55440

(WTL 21-9418)

645a

SOO FREIGHT TARIFF 543-B

## RULES AND OTHER GOVERNING PROVISIONS

| ITEM | SUBJECT | APPLICATION |
|---|---|---|
| 10 | STATION LISTS AND CONDITIONS | THIS TARIFF IS GOVERNED BY THE OFFICIAL LIST OF OPEN AND PREPAY STATIONS 87, I.C.C. A-52, MINN. P.S.C. A-52 ISSUED BY STATION LIST PUBLISHING COMPANY, AGENT, TO THE EXTENT SHOWN BELOW:<br>PREPAY REQUIREMENTS AND STATION CONDITIONS<br>FOR ADDITIONS AND ABANDONMENTS OF STATIONS, AND, EXCEPT AS OTHERWISE SHOWN HEREIN, FOR PREPAY REQUIREMENTS, CHANGES IN NAMES OF STATIONS, RESTRICTIONS AS TO ACCEPTANCE OR DELIVERY OF FREIGHT, AND CHANGES IN STATION FACILITIES.<br>WHEN A STATION IS ABANDONED AS OF A DATE SPECIFIED IN THE ABOVE TARIFF, AS AMENDED, THE RATES FROM AND TO SUCH STATION AS PUBLISHED IN TARIFF, AS AMENDED, ARE INAPPLICABLE ON AND AFTER THAT DATE.<br>GEOGRAPHICAL LIST OF STATIONS<br>FOR GEOGRAPHICAL LOCATIONS OF STATIONS REFERRED TO IN THIS TARIFF BY STATION NUMBERS.<br>STATION NUMBERS<br>FOR THE IDENTIFICATION OF STATIONS WHEN STATIONS ARE SHOWN OR REFERRED TO BY NUMBERS IN THIS TARIFF |
| 20 | REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC. | WHERE REFERENCE IS MADE IN THIS TARIFF TO TARIFFS, ITEMS, NOTES, RULES, ETC., SUCH REFERENCES ARE CONTINUOUS AND INCLUDE SUPPLEMENTS TO AND SUCCESSIVE ISSUES OF SUCH TARIFFS AND REISSUES OF SUCH ITEMS, NOTES, RULES, ETC. |
| 35 | TRANSFER BETWEEN CONNECTING CARRIERS | THE JOINT RATE PUBLISHED HEREIN INCLUDES ALL CHARGES FOR SWITCHING, DRAYAGE, OR OTHER TRANSFER SERVICE AT INTERMEDIATE INTERCHANGE POINTS ON SHIPMENTS HANDLED THROUGH AND NOT STOPPED FOR SPECIAL SERVICES AT SUCH INTERMEDIATE INTERCHANGE POINTS. |
| 45 | CAPACITIES AND DIMENSIONS OF CARS | FOR MARKED CAPACITIES, LENGTHS, DIMENSIONS AND CUBICAL CAPACITIES OF CARS, SEE THE OFFICIAL RAILWAY EQUIPMENT REGISTER, I.C.C. RER-388 ISSUED BY THE RAILWAY EQUIPMENT AND PUBLICATION COMPANY, AGENT. (SEE NOTE)<br>NOTE - WHEN RATES PUBLISHED IN THIS TARIFF ARE SUBJECT TO A MINIMUM WEIGHT BASED ON THE MARKED CAPACITY OF CAR, AND THE MARKED CAPACITY SET FORTH IN THE OFFICIAL RAILWAY EQUIPMENT REGISTER IS AS SHOWN IN COLUMN A BELOW, THE WEIGHT SHOWN IN COLUMN B WILL BE USED INSTEAD OF THE MARKED CAPACITY IN DETERMINING THE MINIMUM WEIGHT:<br>COLUMN A — COLUMN B<br>80,000 POUNDS — 88,000 POUNDS<br>100,000 POUNDS — 110,000 POUNDS<br>140,000 POUNDS — 154,000 POUNDS<br>CARS MAY NOT BE LOADED IN EXCESS OF THE LOAD LIMIT. WHERE THE MINIMUM WEIGHT AS PROVIDED IN THIS ITEM EXCEEDS 95 PERCENT OF THE LOAD LIMIT OF THE CAR FURNISHED, FREIGHT CHARGES WILL BE DETERMINED BY ACTUAL WEIGHT OF SHIPMENT, BUT NOT LESS THAN 95 PERCENT OF THE LOAD LIMIT. BILLS OF LADING MUST BE ENDORSED TO SHOW THE LOAD LIMIT OF THE CAR USED.<br>RULE 4 (1) OF TARIFF CIRCULAR WAIVED: I.C.C. PERMISSION NO. 36717. |
| 60 | NATIONAL SERVICE ORDER TARIFF | THIS TARIFF IS SUBJECT TO PROVISIONS OF VARIOUS INTERSTATE COMMERCE COMMISSION SERVICE ORDERS AND GENERAL PERMITS AS SHOWN IN NATIONAL SERVICE ORDER TARIFF 1-E, I.C.C. A-4760, WESTERN TRUNK LINE COMMITTEE, AGENT. |
| 75 | METHOD OF CANCELLING ITEMS | AS THIS TARIFF IS SUPPLEMENTED, NUMBERED ITEMS WITH LETTER SUFFIXES CANCEL CORRESPONDINGLY NUMBERED ITEMS IN THE ORIGINAL TARIFF OR IN A PRIOR SUPPLEMENT. LETTER SUFFIXES WILL BE USED IN ALPHABETICAL SEQUENCE STARTING WITH A. EXAMPLE: ITEM 145-A CANCELS ITEM 145, AND ITEM 220-B CANCEL ITEM 220-A IN A PRIOR SUPPLEMENT, WHICH IN TURN, CANCELLED ITEM 220. |

FOR EXPLANATION OF ABBREVIATIONS, SEE CONCLUDING PAGE OF THIS TARIFF.

## RULES AND OTHER GOVERNING PROVISIONS

| ITEM | SUBJECT | APPLICATION |
|---|---|---|
| 85 | INTERMEDIATE APPLICATION - DESTINATION | APPLICABLE ONLY IN CONNECTION WITH RATES WHICH ARE DEPENDENT IN THEIR APPLICATION UPON THE MOVEMENT OF A STATED VOLUME IN CONSECUTIVE MOVEMENTS.<br>SUBJECT TO THE PROVISIONS OF NOTES 1,2,3 AND 4 BELOW, TO ANY POINT OF DESTINATION TO WHICH A COMMODITY RATE ON A GIVEN ARTICLE FROM A GIVEN POINT OF ORIGIN AND VIA A GIVEN ROUTE IS NOT NAMED IN THIS TARIFF, WHICH POINT IS INTERMEDIATE TO A POINT TO WHICH A COMMODITY RATE ON SAID ARTICLE IS PUBLISHED IN THIS TARIFF VIA A ROUTE THROUGH THE INTERMEDIATE POINT OVER WHICH SUCH COMMODITY RATE APPLIES FROM THE SAME POINT OF ORIGIN, APPLY TO SUCH INTERMEDIATE POINT FROM SUCH POINT OF ORIGIN AND VIA SUCH ROUTE THE COMMODITY RATE IN THIS TARIFF ON SAID ARTICLE TO THE NEXT POINT BEYOND TO WHICH A COMMODITY RATE IS PUBLISHED HEREIN ON THAT ARTICLE FROM THE SAME POINT OF ORIGIN VIA THE SAME ROUTE.<br>NOTE 1 - THE RATE TO THE INTERMEDIATE POINT AUTHORIZED BY THIS RULE IS SUBJECT TO THE SAME CONDITIONS TO WHICH THE RATE TO THE NEXT POINT BEYOND IS SUBJECT.<br>NOTE 2 - WHEN BY REASON OF BRANCH OR DIVERGING LINES THERE ARE TWO OR MORE "NEXT BEYOND" POINTS, APPLY THE RATE TO THE NEXT POINT BEYOND IN THIS TARIFF WHICH ON THAT ARTICLE FROM THE SAME POINT OF ORIGIN VIA THE SAME ROUTE RESULTS IN THE LOWEST CHARGE.<br>NOTE 3 - IF THE INTERMEDIATE POINT IS LOCATED BETWEEN TWO POINTS TO WHICH COMMODITY RATES ON THE SAME ARTICLE VIA THE SAME ROUTE ARE PUBLISHED IN THIS TARIFF, APPLY VIA THAT ROUTE TO THE INTERMEDIATE POINT THE RATE TO THE NEXT POINT IN EITHER DIRECTION WHICH RESULTS IN THE HIGHER CHARGE. IN APPLYING THIS NOTE, IF THERE ARE TWO OR MORE NEXT BEYOND POINTS DUE TO BRANCH OR DIVERGING LINES, ELIMINATE ALL SUCH NEXT BEYOND POINTS EXCEPT THE POINT TO WHICH THE LOWEST CHARGE IS APPLICABLE.<br>NOTE 4 - IF THERE IS IN ANY OTHER TARIFF A COMMODITY RATE ON THE SAME ARTICLE DEPENDENT IN ITS APPLICATION UPON THE MOVEMENT OF A STATED VOLUME IN CONSECUTIVE MOVEMENTS TO THE INTERMEDIATE DESTINATION APPLICABLE OVER THE SAME ROUTE FROM THE ORIGIN, THE PROVISIONS OF THIS RULE ARE NOT APPLICABLE TO SUCH INTERMEDIATE DESTINATION POINT.<br>RULE 27 OF TARIFF CIRCULAR WAIVED; ICC PERMISSION 74-1051. |
| 100 | METHOD OF DENOTING REISSUED MATTER IN SUPPLEMENTS | MATTER BROUGHT FORWARD WITHOUT CHANGE FROM ONE [illegible]LEMENT TO ANOTHER WILL BE DESIGNATED AS "REISSUED" BY A REFERENCE MARK IN THE FORM OF A SQUARE ENCLOSING A NUMBER, THE NUMBER BEING THAT OF THE SUPPLEMENT IN WHICH THE REISSUED MATTER FIRST APPEARED IN ITS CURRENTLY EFFECTIVE FORM. TO DETERMINE ITS ORIGINAL EFFECTIVE DATE CONSULT THE SUPPLEMENT IN WHICH THE REISSUED MATTER FIRST BECAME EFFECTIVE. |
| 110 | NON-APPLICATION OF TERMINAL OR TRANSIT PRIVILEGES OR SERVICES | EXCEPT AS OTHERWISE PROVIDED, NORMAL TERMINAL OR TRANSIT SERVICE AND PRIVILEGES SUCH AS WEIGHING, INSPECTION, DIVERSION OR RECONSIGNMENT, WILL NOT APPLY IN CONNECTION WITH THE RATE PUBLISHED IN THIS TARIFF.<br>THIS TARIFF IS SUBJECT TO AGENT B. B. MAURER'S MILEAGE TARIFF 7-C, I.C.C. H-54. |

FOR EXPLANATION OF ABBREVIATIONS SEE CONCLUDING PAGE OF THIS TARIFF.

## RULES AND OTHER GOVERNING PROVISIONS

| ITEM | SUBJECT | APPLICATION |
|---|---|---|
| 115 | DEMURRAGE | CARS HANDLED UNDER THE PROVISIONS OF THIS ITEM ARE NOT SUBJECT TO AGENT B.B. MAURERS TARIFF 4-J, I.C.C. H-59 AND THE PROVISIONS OF THIS ITEM WILL APPLY IN LIEU THEREOF. FREE TIME FOR LOADING AND UNLOADING AND CHARGES FOR DETENTION AFTER EXPIRATION OF FREE TIME WILL BE AS FOLLOWS:<br>1. EMPTY CARS SUFFICIENT IN NUMBER TO COVER THE CONSECUTIVE MOVEMENT WILL BE ACTUALLY PLACED OR CONSTRUCTIVELY PLACED AT ORIGIN. TWENTY-FOUR (24) HOURS FREE TIME, EXCLUSIVE OF SATURDAYS, SUNDAYS OR HOLIDAYS (SEE NOTE 1) WILL BE PERMITTED FOR LOADING OF ALL CARS IN A CONSECUTIVE MOVEMENT. TIME TO BE COMPUTED FROM TIME THE FIRST CAR IN THE CONSECUTIVE MOVEMENT IS ACTUALLY OR CONSTRUCTIVELY PLACED. IN THE EVENT THE ENTIRE CONSECUTIVE MOVEMENT IS NOT TENDERED TO CARRIER FOR MOVEMENT TO DESTINATION WITHIN TWENTY-FOUR (24) HOURS, EXCLUSIVE OF SATURDAYS, SUNDAYS OR HOLIDAYS (SEE NOTE 1) AFTER PLACEMENT, ACTUAL OR CONSTRUCTIVE, DETENTION CHARGES IN THE AMOUNT OF $475.00 FOR EACH TWENTY-FOUR (24) HOUR PERIOD OR FRACTION THEREOF SUBSEQUENT TO FREE TIME SHALL BE ASSESSED.<br>2. THIRTY-SIX (36) HOURS FREE TIME, EXCLUSIVE OF SATURDAYS, SUNDAYS OR HOLIDAYS (SEE NOTE 1) WILL BE PERMITTED FOR UNLOADING THE ENTIRE CONSECUTIVE MOVEMENT AT DESTINATION. TIME TO BE COMPUTED FROM THE FIRST 7:00 AM AFTER ACTUAL OR CONSTRUCTIVE PLACEMENT. IN THE EVENT ALL CARS ARE NOT TENDERED AFTER UNLOADING TO CARRIER AT DESTINATION WITHIN THIRTY-SIX(36) HOURS, EXCLUSIVE OF SATURDAYS, SUNDAYS OR HOLIDAYS (SEE NOTE 1) AFTER ACTUAL OR CONSTRUCTIVE PLACEMENT, A DETENTION CHARGE OF $9.50 PER CAR WILL BE ASSESSED ON ALL CARS IN THE CONSECUTIVE MOVEMENT FOR EACH 24 HOUR PERIOD OR FRACTION THEREOF SUBSEQUENT TO FREE TIME.<br>3. "ACTUAL PLACEMENT" IS MADE WHEN CARS ARE PLACED FOR LOADING OR UNLOADING. IF SUCH ACTUAL PLACEMENT IS PREVENTED DUE TO ANY CAUSE ATTRIBUTABLE TO CONSIGNOR OR CONSIGNEE, THE CARS WILL BE HELD AT AVAILABLE HOLD POINT AND NOTICE SHALL BE SENT OR GIVEN TO CONSIGNOR (IF OCCURRENCE AT ORIGIN) OR CONSIGNEE (IF OCCURRENCE AT DESTINATION) THAT CARS ARE SO HELD AND RAILROAD IS UNABLE TO MAKE DELIVERY WHICH SHALL BE CONSIDERED "CONSTRUCTIVELY PLACED" AND FREE TIME WILL BE COMPUTED AT ORIGIN AS PROVIDED IN PARAGRAPH 1 AND AT DESTINATION AS PROVIDED IN PARAGRAPH 2, THE SAME AS IF THE CARS HAD BEEN ACTUALLY PLACED.<br>NOTE 1 - LIST OF HOLIDAYS<br>WHEREVER IN THIS TARIFF, REFERENCE IS MADE TO "HOLIDAYS" IT MEANS THE FOLLOWING:<br>NEW YEAR'S DAY<br>WASHINGTON'S BIRTHDAY<br>MEMORIAL DAY<br>INDEPENDENCE DAY<br>LABOR DAY<br>THANKSGIVING DAY<br>CHRISTMAS DAY<br>IN THE EVENT ONE OF THE ABOVE HOLDIAYS OCCURS ON SUNDAY, THE FOLLOWING MONDAY WILL BE CONSIDERED AS A HOLIDAY FOR THE PURPOSE OF THIS TARIFF.<br>THE DATES OBSERVED FOR ABOVE HOLDIAYS WILL BE PROVIDED BY FEDERAL LAW EXCEPT WHERE INDIVIDUAL STATES DECREE OTHERWISE. |
| 125 | MINIMUM WEIGHT PER CAR USED | MINIMUM WEIGHT SHALL BE 190,000 POUNDS PER CAR USED. |

FOR EXPLANATION OF ABBREVIATIONS, SEE CONCLUDING PAGE OF THIS TARIFF.

## RULES AND OTHER GOVERNING PROVISIONS

| ITEM | SUBJECT | APPLICATION |
|---|---|---|
| 130 | APPLICATION OF RATE AND CONSECUTIVE MOVEMENTS | (Subject to Notes 2 and 3)<br>(A) Provisions of this tariff apply on wheat, in bulk, in covered hopper cars having capacity of 4500 cubic feet and over.<br>(B) The aggregate minimum weight per movement is 5,000 tons of 2,000 pounds each subject to an aggregate minimum weight of 15,000 tons of 2,000 pounds per shipment. (See Item 132).<br>Commencing with the initial consecutive movement (See Notes 4 and 5) of a shipment from origins named in Item 140 to destination, the consignee must receive total of three (3) consecutive movements, consisting of the same cars as in the original movement. Each shipment must consist of not less than three (3) consecutive movements. (See Note 1).<br>(D) If the tonnage required of a consignee is not met, rate in item making reference to this item shall not be applicable on shipments that have moved unless the charges resulting from application of rates in Section 2 of WTL 332-H I.C.C. No. A-4864 and Item 5036 of TLCTR C/TN 245-I, I.C.C. C-375 exceed the lowest charge that would have been collected if the tonnage requirement had been met. In this event, the deficit in tonnage shall be billed at the applicable rate in this tariff and be collected by the Erie Lackawanna Railway Company and such revenue will be prorated as agreed upon between carriers participating in the rate.<br>(E) Certification of shipments moving at rates as provided in this tariff shall be made by the Eastern Weighing and Inspection Bureau.<br>Note 1 - In complying with this provision, consignee may originate each succeeding movement at the same or any other origin named in Item 140 and forward to destination. The applicable rate on each movement will be that in effect on date shipped from origin named herein regardless of higher or lower rate application on prior or subsequent movement constituting part of a shipment (see example) (see Paragraph B, Item 135).<br>Example - If two of three consecutive movements originate prior to December 14 and the third originates on December 17 the rate to apply on the first two consecutive movements will be 72 1/4 cents cwt. and on the third consecutive movement the rate to apply will be 88 cents cwt.<br>Note 2 - Minimum weight per car as provided in Item 125.<br>Note 3 - All cars in each consecutive movement must be tendered on one bill of lading, on a single day, from one consignor at one location at origin to a single consignee, at one location at destination where all cars must be completely unloaded.<br>Note 4 - Each consecutive movement in a shipment is one preceding or following unloading of a consecutive movement at destination and billing return of equipment to a specific location at an origin named in Item 140 for reloading. The empty cars will be placed at the specified location for reloading and forwarding to destination.<br>Note 5 - Prior to the initial movement consignee must notify the EL and Soo in writing of intention to use the consecutive movement rates in this tariff.<br>Rules 4 (1) and 7 of Tariff Circular waived, I.C.C. Permission No. 74-1051. |

## RULES AND OTHER GOVERNING PROVISIONS

| ITEM | SUBJECT | APPLICATION |
|---|---|---|
| 132 | DISABILITY RULE | ANY DAY (24 HOURS) OR DAYS WHICH DUE TO AN ACT OF GOD, STRIKE, OR LOCKOUTS IN THE RAILROAD INDUSTRY OR STRIKES, LOCKOUTS, MECHANICAL BREAKDOWN (SEE NOTE 1), OR FIRE (SEE NOTE 1) IN THE CONSIGNORS OR CONSIGNEES PLANT, WHICH DISRUPTS THEIR OPERATION, WILL BE CONSIDERED AS A DISABILITY DAY OR DAYS.<br>IF THE CONSECUTIVE MOVEMENTS PROVIDED FOR IN ITEM 130 ARE INTERRUPTED AS A RESULT OF THE DISABILITY DAY OR DAYS AS DESCRIBED ABOVE, THE CONCLUSIONS OF THE CONSECUTIVE MOVEMENT REQUIREMENTS ARE TO BE FULFILLED IMMEDIATELY AFTER SUCH DISABILITY HAS BEEN CORRECTED.<br>IN THE EVENT THE PROVISIONS OF THIS ITEM ARE INVOKED AND A SHIPMENT IS ENROUTE OR AT THE ORIGINAL FACILITY, A DIVERSION OR CHANGE IN BILLING INSTRUCTIONS WILL BE PERMITTED TO EFFECT DELIVERY AT A CHARGE OF $10.00 PER CAR, WHICH WILL BE IN ADDITION TO THE LINE HAUL RATE NAMED HEREIN. IN THE EVENT A CONSECUTIVE MOVEMENT HAS BEEN PLACED IN ACCORDANCE WITH ORIGINAL BILLING INSTRUCTIONS, THE FOLLOWING WILL APPLY:<br>IF BILLED TO A FACILITY AT THE SAME DESTINATION, THE LOCAL SWITCHING CHARGES TO EFFECT DELIVERY WILL BE IN ADDITION TO THE LINE HAUL RATE AND DIVERSION CHARGE.<br>THE CONSIGNOR, CONSIGNEE OR PARTICIPATING CARRIER(S) ENCOUNTERING DISABILITY DAYS SHALL WITHIN FIVE (5) DAYS FROM DATE OF DISABILITY NOTIFY IN WRITING THE BILLING AGENT OF THE CARRIER RESPONSIBLE FOR COLLECTION OF THE FREIGHT CHARGES OF SUCH DISABILITY AND REASONS THEREFORE.<br>NOTE 1 - BREAKDOWN OR FIRE IN THE FACILITIES OF CONSIGNOR OR CONSIGNEE WILL INCLUDE ONLY THE MECHANICAL BREAKDOWN OF OR FIRE TO EQUIPMENT VITAL TO THE LOADING OR UNLOADING OPERATIONS.<br>RULES 4 (1) AND 7 OF TARIFF CIRCULAR WAIVED; I.C.C. PERMISSION NO. 74-1051. |
| 135 | BAD ORDER CARS | (A) IF IN A MOVEMENT ONE OR MORE CARS BECOME BAD ORDER, SUCH BAD ORDER CAR OR CARS WILL BE FORWARDED TO DESTINATION AS SOON AS PRACTICABLE AND SUCH CARS WILL BE CONSIDERED AS HAVING BEEN MOVED IN THE TRAIN ON WHICH THEY WERE ORIGINALLY ASSIGNED.<br>(B) CARRIERS WILL ONLY BE REQUIRED TO REPLACE SUCH CAR OR CARS PRIOR TO THE NEXT LOADING TO THE EXTENT NECESSARY TO PROTECT THE INTEGRITY OF THE MINIMUM WEIGHTS PER MOVEMENT. |

## RATES

| ITEM | COMMODITY | APPLICATION | | RATE IN CENTS PER 100 POUNDS | ROUTE |
|---|---|---|---|---|---|
| | | FROM | TO | | |
| 140 | WHEAT, IN BULK<br>SUBJECT TO ITEMS 115, 125 AND 130 | DULUTH...............MINN.<br>MINNEAPOLIS..........MINN.<br>MINNESOTA TRANSFER..MINN.<br>ST. PAUL............MINN.<br>SUPERIOR............WIS. | MARTINS CREEK...PA. | ① 72 1/4<br>② 88<br>(SEE NOTE 1) | SEE ITEM 145 |

NOTE 1 - PROPORTIONAL RATE APPLICABLE ONLY ON TRAFFIC WHICH HAS ORIGINATED BEYOND BY RAIL. RATE WILL APPLY ON TRAFFIC WHICH HAS BEEN STORED IN TRANSIT, AS AUTHORIZED IN WTL TARIFF 331-Z, I.C.C. A-4774, AT STATION FROM WHICH RATE IS APPLIED. (NOT SUBJECT TO THE PROVISIONS OF ITEM 80 OF WTL TARIFF 331-Z, I.C.C. A-4774).

① - APPLIES DURING PERIOD OF NOVEMBER 1, 1973 THROUGH DECEMBER 14, 1973 AND DURING PERIOD BEGINNING WITH APRIL 1, 1974 AND ENDING SEPTEMBER 15, 1974.

② - APPLIES DURING PERIOD BEGINNING WITH DECEMBER 15, 1973 AND ENDING MARCH 31, 1974.

## RULES AND OTHER GOVERNING PROVISIONS

| ITEM | SUBJECT | APPLICATION |
|---|---|---|
| 145 | ROUTING | SOO - CHICAGO, ILLINOIS - EL |

## EXPLANATION OF ABBREVIATIONS AND REFERENCE MARKS

| | |
|---|---|
| EL | ERIE LACKAWANNA RAILWAY COMPANY |
| I.C.C | INTERSTATE COMMERCE COMMISSION |
| RER | RAILWAY EQUIPMENT REGISTER |
| SOO | SOO LINE RAILROAD COMPANY |
| WTL | WESTERN TRUNK LINE |

Appendix 4

## ITEM BY ITEM COMPARISON OF BUFFALO VS. MARTINS CREEK TARIFFS

| Subject | Buffalo Unit Train Tariff Soo 526-I ICC 7755 | Martins Creek Unit Train Tariff Soo 543-B ICC 7837 |
|---|---|---|
| 1. Station Lists and Conditions | No | Yes |
| 2. Reference to Tariffs, Items, Notes, Rules, etc. | Yes | Yes |
| 3. Transfer Between Connecting Carriers | Yes | Yes |
| 4. Capacities and Dimensions of Cars | Yes | Yes |
| 5. National Service Order | Yes | Yes |
| 6. Alternation Unit Train Rates-Varying Minimum Weights | Yes | No |
| 7. Method of Cancelling Items | Yes | Yes |
| 8. Intermediate Application Origin | No | No |
| 9. Intermediate Application Destination | Yes | Yes |
| 10. Method of Denoting Reissued matter in Supplements | Yes | Yes |
| 11. Non-Application of Terminal or Transit Privileges or Services | Yes | Yes |
| A. Subject to Maurer's Mileage Tariff 7-C | No | Yes |
| 12. Demurrage | | |
| A. Origin - 24 hours free time to load | Yes | Yes |
| - Detention charge $475.00 per unit per day. | Yes | Yes |
| B. Destination - 36 hours free time to unload | Yes | Yes |
| - Detention charge $9.50 per car per day to be assessed on all cars in unit. | Yes | Yes |
| C. Free Holidays | No | Yes |
| 13. Straight or Mixed Carloads | Yes | No |
| A. Not necessary in Martins Creek tariff as rates apply on only one commodity. | | |
| 14. Commodities involved | | |
| A. Barley, Rye and/or Wheat | Yes | No |
| B. Wheat only | No | Yes |
| 15. Origins | | |
| A. Twin Cities | Yes | Yes |
| B. Twin Ports | Yes | Yes |
| 16. Minimum Weight 190,000 lbs. per car | Yes | Yes |
| 17. Aggregate Minimum Weight per Movement 5,000 tons | Yes | Yes |
| 18. Three consecutive movements Requirement and Governing Rules | No | Yes |
| 19. Seasonal Rate Application | No | Yes |
| 20. Proportional Rate | Yes | Yes |
| 21. Flat Rate | No | No |
| 22. Box Car Rate at Higher Level | Yes | No |
| 23. Disability Rule | No | Yes |
| 24. Bad Order Car Rule | No | Yes |

## EXAMPLES OF GRAIN RATE PARITY MINNEAPOLIS VS. DULUTH

| To | 28300 Miles | Rate |  | Revenue Per Ton Mile | Type of Rate |
|---|---|---|---|---|---|
|  |  | Cwt. | Net Ton |  |  |
| (1) Martins Creek, Pa. | ( D-1146 | 72.25¢ | $ 14.45 | .0126¢ ) | Unit Train - Proportional Rates |
|  | ( M-1131 | 72.25¢ | $ 14.45 | .0128¢ ) |  |
|  | ( D-1146 | 88.0¢ | $ 17.60 | .0154¢ ) |  |
|  | ( M-1131 | 88.0¢ | $ 17.60 | .0156¢ ) |  |
| (2) Buffalo, N. Y. | ( D-803 | 43.0¢ | $ 8.60 | .0107¢) | Unit Train - Proportional Rate |
|  | ( M-788 | 43.0¢ | $ 8.60 | .0109¢) |  |
| (3) New Orleans, La. | ( D-1314 | 65.0¢ | $ 13.00 | .0099¢ ) | 1000 Ton Multi-Car Export Proportional Rate |
|  | ( M-1210 | 65.0¢ | $ 13.00 | .0107¢ ) |  |
|  | ( D-1192 | 68.0¢ | $ 13.60 | .0114¢ ) | 1000 Ton Multi-Car Export Proportional Rate |
|  | ( M-1156 | 68.0¢ | $ 13.60 | .0118¢ ) |  |
|  | ( |  |  |  |  |
| (4) Baltimore, Md. | ( D-1192 | 70.0¢ | $ 14.00 | .0117¢ ) | Unit Train - Flat Export Rate |
|  | ( M-1156 | 70.0¢ | $ 14.00 | .0121¢ ) |  |
|  | ( |  |  |  |  |
|  | ( D-1192 | 72.0¢ | $ 14.40 | .0121¢ ) | 1470 Ton Multi-Car Flat Export Rate |
|  | ( M-1156 | 72.0¢ | $ 14.40 | .0125¢ ) |  |
|  | ( D-1365 | 68.0¢ | $ 13.60 | .0100¢ ) | 1000 Ton Multi-Car Export Proportional Rate |
|  | ( M-1309 | 68.0¢ | $ 13.60 | .0104¢ ) |  |
|  | ( |  |  |  |  |
| (5) Norfolk, Va. | ( D-1365 | 70.0¢ | $ 14.00 | .0103¢ ) | Unit Train- Flat Export Rate |
|  | ( M-1309 | 70.0¢ | $ 14.00 | .0107¢ ) |  |
|  | ( |  |  |  |  |
|  | ( D-1365 | 72.0¢ | $ 14.40 | .0105¢ ) | 1470 Ton Multi-Car Flat Export Rate |
|  | ( M-1309 | 72.0¢ | $ 14.40 | .0110¢ ) |  |

### Explanation of Reference Marks

D - Duluth, Minnesota
M - Minneapolis, Minnesota

(1) Soo Line F. T. 543-B, ICC 7837
(2) Soo Line F.T. 526-I, ICC 7755
(3) Soo Line F.T. 459-L, ICC 7843
(4) WTL F.T. 470-E, ICC A-4869
(5) WTL F.T. 332-H, ICC A-4864

STATE OF MINNESOTA )
) SS
COUNTY OF HENNEPIN )

Ray H. Smith, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

Signed____________________
Ray H. Smith

Subscribed and sworn to before

me this 14th day of December 1973.

____________________
Edwin G. Watts

(6)

PROTESTANT BUFFALO AREA CHAMBER OF COMMERCE

Exhibit No.________________

BEFORE THE

INTERSTATE COMMERCE COMMISSION

| | | |
|---|---|---|
| UNIT TRAIN RATES ON WHEAT,<br>MINNESOTA AND WISCONSIN TO<br>MARTINS CREEK, PA. | )<br>)<br>) | I & S DOCKET NO. 8899 |

# VERIFIED STATEMENT OF EDWARD T. BRICK

Before The

INTERSTATE COMMERCE COMMISSION

---

UNIT TRAIN RATES ON
WHEAT, MINNESOTA AND WISCONSIN
TO MARTINS CREEK, PA.
(I & S DOCKET NO. 8899)

---

## VERIFIED STATEMENT

## OF

## EDWARD T. BRICK

---

My name is Edward T. Brick. I am employed by the Buffalo Area Chamber of Commerce as Director of Transportation and World Trade. I have been employed by the Chamber since 1960 to oversee activities in the field of transportation. Specifically, I am responsible for the collection and dissemination of information on transportation by rail, motor carrier, water and air; to study and interpret transportation data, including legislation, for its effect on the Buffalo area; to assist Chamber members on technical phases and problems of transportation and to, among other items, actively participate in transportation proceedings before governmental regulatory bodies.

The respondent railroads in their Tariff 543-B seek authorization for a two level unit train rate from Duluth et al to Martins Creek, Pa.

Buffalo is the largest flour producing center in the United States and, as such, we are extremely concerned that legalization of the proposed rates could destroy this area industry as it stands today.

A new market will not have been created for disposition of what we understand to be a Martins Creek production of 6000 cwt. per day of spring wheat flour. They are directly dependent upon the same basic distribution area and customers as are the Buffalo mills. Their annual production at this 6000 cwt. per day level equals over 21 days production for the Buffalo mills, collectively. This possibly could have the effect of reducing Buffalo mull runs to 11 months per year. Also, this does not take into consideration the 5000 cwt. per day Durum unit nor the announced intention of increasing capacity of the spring mill up to 10,000 cwt. per day. Considering the latter factors, such annual production would equal about two months running time for the six Buffalo flour mills.

The Martins Crrek situation represents a very real threat to Buffalo today. Equally significant is the danger presented in this type of ratemaking which, if not checked, could continue to encourage expansion of existing facilities east of Buffalo and the creation of new mills east of Buffalo. [We understand that currently under consideration or construction are mills at Hudson and Albany, N. Y., Chester, Pa. and the Boston area.] It becomes quite clear that this could precipitate further erosion of Buffalo's feed and flour industry. This could well be correlated with the disruption of the grain movement over Buffalo with the advent of the St. Lawrence Seaway.

motion to
strike
granted

An additional potential adverse result of this proposal relates to steamship interests and the Port of Buffalo. Wheat grind replacement for the 6000 cwt. spring unit no doubt will move unit train direct and that could mean a possible reduction of 10 vessels that would not unload for reshipment at the Port. When we add in the 5000 cwt. Durum unit, it results in a further reduction of 8 1/2 boatloads and increasing the spring unit up to 10,000 cwt. per day adds another 7 potential boatloads that could be lost to the Port. Coupled to all this, the loss of capacity at Buffalo and the resulting reduction of grind replacement required by the Buffalo mills could quite possibly eliminate ~~another~~ potential 25 to 30 vessels.

It is my opinion that authorization of the proposed rate would have a highly adverse and disruptive effect on one of Buffalo's major industries in particular and on the area economy in general.

STATE OF NEW YORK )
) SS
COUNTY OF ERIE )

EDWARD T. BRICK, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same is true as stated.

Signed Edward T. Brick
Edward T. Brick

Subscribed and sworn to before me
this 14th day of January, 1974

Raymond X. Hall
Raymond X. Hall

Notary Public
Erie County

Commission Expires 3/30/74

(16)

Before the

INTERSTATE COMMERCE COMMISSION

I & S No. 8899

UNIT TRAIN RATES ON WHEAT, MINN.
& WISC., TO MARTINS CREEK, PA.

# VERIFIED STATEMENT
# OF
# DONALD J. STONE

My name is Donald J. Stone. I am General Traffic Manager of ConAgra, Inc., Kiewit Plaza, Omaha, Nebraska 68131. I have held my present position since January 1, 1970. Prior to my employment with ConAgra, Inc. (formerly known as Nebraska Consolidated Mills Co.) I was employed for fifteen years in various transportation positions by the Colorado Milling and Elevator Company with corporate headquarters in Denver, Colorado. I was appointed General Traffic Manager of the Colorado Milling and Elevator Company on August 1, 1968, and I continued in that position until I accepted the position I now hold with ConAgra, Inc. In my eighteen years of experience with firms who operate plants in nearly all major geographic regions of the United States, I have acquired valuable experience and background with respect to transportation of grain and grain products. My duties and responsibilities as General Traffic Manager of ConAgra include supervision and responsibility for equipment supply, selection of carriers, rate negotiations and rate analysis, transportation cost control and overall supervision of company transportation activities.

ConAgra, Inc., a Nebraska corporation, is an Omaha based diversified producer of basic foods with 73 plants in four countries. ConAgra's product groups include formula feeds for poultry and livestock, dry corn and oat mill products, broiler chickens, eggs, grocery products for home baking, farm-raised catfish, horse feeding products, bakery flour and soft wheat flour which is used for crackers, biscuits, cookies, cakes and pastries. ConAgra operates a total of fifteen flour mills in the United States which are identified below by size and location:

| LOCATION | CWTS.DAILY PRODUCTION[1/] | TYPE OF FLOUR |
|---|---|---|
| Decatur, Ala. | 7,300 cwts. | Bakery & Soft Wheat Flour |
| Oakland, Calif. | 6,500 cwts. | Bakery |

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1/ Production figure represents hundredweights of flour produced in 24-hour period which is customary trade method of expressing production capabilities.

| | | |
|---|---|---|
| Tampa, Fla. | 4,000 cwts. | Bakery |
| Macon, Ga. | 3,300 cwts. | Soft Wheat Flour |
| Chester, Ill. | 8,000 cwts. | Soft Wheat Flour |
| Fergus Falls, Minn. | 4,000 cwts. | Bakery |
| Great Falls, Mont. | 5,000 cwts. | Bakery |
| Fremont, Nebraska | 6,800 cwts. | Bakery |
| Grand Island, Nebr. | 4,000 cwts. | Bakery |
| Omaha, Nebr."A" | 7,800 cwts. | Bakery |
| Omaha, Nebr."B" | 7,400 cwts. | Bakery |
| Martins Creek, Pa. | 6,000 cwts. | Bakery |
| Red Lion, Pa. | 2,000 cwts. | Soft Wheat Flour |
| Treichlers, Pa. | 3,000 cwts. | Soft Wheat Flour |
| Sherman, Texas | 4,500 cwts. | Bakery |

Looking back to the year 1963, ConAgra (then Nebraska Consolidated Mills Co.) was operating only four of the above identified mills, specifically Decatur, Alabama, Fremont, Nebraska, Grand Island, Nebraska and Omaha "A", Nebraska. Restated, ConAgra has expanded its flour milling operations by either the acquisition or construction of eleven flour mills in the United States in the past ten years.[2/] During the same period, gross sales of ConAgra increased from approximately

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[2/] Figures do not include flour mills purchased and now idle or sold during the ten year span from 1963 to 1973.

$76 million to approximately $420 million. ConAgra's thrust and corporate objectives are clearly evident by the growth pattern of the past ten years. It has been stated publicly by ConAgra management on many occasions that we have a long-range objective of locating flour mills in close proximity to the nation's major flour consuming markets. The underlying reason for this commitment is very basically one of being in a position to be more responsive to our customers, which really means nothing more than to have our mills in geographic locations where we can provide superior service. We all live and exist in a business environment where good, consistent reliable service is almost a way-of-life and the flour milling industry is no exception. This is particularly true at ConAgra where our dedication to "service superiority" is well evidenced by the capital invested in having many mills geographically dispersed and immediately adjacent to most major flour markets.

ConAgra's new flour mill at Martins Creek, Pennsylvania, (which officially opened on June 18, 1973) merely represents one more example of ConAgra's commitment and dedication to the concept of having flour mills immediately accessible to all major flour consuming markets. Martins Creek is situated approximately 75 to 90 one-way highway miles from major Philadelpha, New York and New Jersey flour markets. The Martins Creek flour mill, which we refer to as Martins Creek "A" plant, is located approximately 1.1 miles from the Martins Creek "B" plant elevator facility where rail cars are unloaded. The "A" plant does not have rail siding, which means that all rail originated grain destined to our "A" mill must be trucked approximately 1.1 miles. Our current elevator storage capacity at the Martins Creek "A" plant is just under one million bushels and storage capacity at Martins Creek "B" plant is now 300,000 bushels. The Martins Creek "A" plant is designed to produce 6,000 hundredweights of flour daily. This translates to approximately 30,000 cwts. of flour weekly on a five day week and 1,560,000 cwts. of flour production annually. In terms of wheat usage, the Martins Creek plant will grind 13,800 bushels daily, 69,000 bushels weekly based on a five day week, and 3,[illegible]8,000 bushels annually.

The forward positioning of flour mills (which essentially means placing flour mills closer to the consumer and more distant from the wheat fields) is not a new concept. The transition has been gradual over a period of several years and today many flour milling companies, including most of the flour milling firms who are protestants in this proceeding, have either acquired or constructed mills to take maximum advantage of the inescapable fact that movements of grain in large volume can be transported cheaper than single cars of flour; hence, transportation charges are lower as milling locations are moved closer to the consuming market. To support my statement that many flour milling companies have recognized the advantages of getting production closer to the consumer and employing modern transportation technology to transport wheat to the milling locations as cheaply as possible, let me first identify the seven protesting millers: The Pillsbury Company, Standard Milling Company, Ross Industries, International Multifoods Corporation, General Mills, Inc., Peavey Company and ADM Milling Company. Each and every one of these protestants with exception of Ross Industries and ADM Milling Company have mills at Buffalo, New York, which can and do take advantage of low cost lake freight charges and unit train rates to originate their grain supplies. The Buffalo mills are a form of the forward positioning that ConAgra has achieved with its new mill at Martins Creek. The most significant difference between Martins Creek and Buffalo is that Martins Creek is geographically a little more distant from the wheat fields and a little less distant from the consumer.

The eastern flour market is vast and the presence and/or impact of ConAgra's flour mill at Martins Creek is most insignificant when all relevant facts are known and considered. The Buffalo mills are geographically in a position to effectively market flour in the following states having the populations listed:

| STATE | POPULATION[3/] | STATE | POPULATION[3/] |
|---|---|---|---|
| Pennsylvania | 11,926,000 | Connecticut | 3,082,000 |
| New York | 18,366,000 | Massachusetts | 5,787,000 |
| New Jersey | 7,367,000 | New Hampshire | 771,000 |
| Maryland | 4,056,000 | Vermont | 462,000 |
| Delaware | 565,000 | Maine | 1,029,000 |
| District of Columbia | 748,000 | Rhode Island | 968,000 |
| GRAND TOTAL | | | 55,127,000 |

The most recent figures available places per capita consumption of flour at 109 pounds annually. Relating that to the population figures of the above states it can be determined that the total flour consumption is 60,088,430 cwts. yearly. That basically represents the demand for flour within the vast flour market on the East Coast, a market which is available to the Buffalo and midwestern mills. ConAgra's total production capabilities of 1,560,000 cwts. of flour annually represents the ability to supply only about 2-1/2% of the total available market.

Attached and identified as Appendix 1 is a list of all flour mills operating at Buffalo, New York, and their respective

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[3/] Source, U.S. Dept. of Commerce, Document series P-25, No. 500, dated May 1973 covering population as of July 1, 1972.

daily rated production capabilities. It will be noted that the six flour mills at Buffalo can produce 83,900 cwts. of flour daily. This is the equivalent of 419,500 cwts. of flour each five day week and 21,814,000 cwts. of flour annually. Relating that to the total market available, which we explained earlier as being slightly over 60 million hundredweights annually, the Buffalo mills have combined capacity to serve 36% of the total market. The combined flour production of Martins Creek and all Buffalo mills can only serve about 38-1/2% of the total market, which dictates that approximately 61-1/2% of the flour must originate from mills in the mid-Atlantic region, central and midwestern states.

ConAgra does not own, lease or otherwise control elevator storage capacity at Duluth-Superior or Buffalo. ConAgra is somewhat unique in that respect because most Buffalo flour millers, who are protesting the Soo Line-EL trainload rate here at issue, do control, lease or use very substantial elevator capacities at Duluth-Superior and also at Buffalo. A breakdown of the elevator storage capacities controlled by each respective protestant who operates a flour mill at Buffalo follows:

| PROTESTANT MILLING COMPANY | ELEVATOR STORAGE CAPACITY AT DULUTH-SUPERIOR | ELEVATOR STORAGE CAPACITY AT BUFFALO, N.Y.(2) |
|---|---|---|
| International Multi-foods Corp. | 5,015,000 bu.(1) | 4,660,000 bu. |
| General Mills, Inc. | 2,670,000 bu.(1) | 5,000,000 bu. |
| Standard Milling Co. | Lease space from protestant ADM Co. | 5,080,000 bu. |
| Pillsbury Company | Use GTA Elevator | 2,700,000 bu. |
| Peavey Company | 4,246,000 bu.(1) | 3,250,000 bu. |

(1) Source, 1972 Annual Report of Minneapolis Grain Exchange.

(2) Source, Milling & Baking News Magazine dated September 1973.

ConAgra has no elevator facilities at Duluth-Superior or Buffalo, nor does ConAgra have any interest in investing capital to acquire or construct elevator facilities to load lakers or trainloads at Duluth-Superior or unload lakers or trainloads at Buffalo. ConAgra is basically a processor of grains (as opposed to a grain buying and selling or merchandising firm) and our grain handling facilities are generally no greater in number or size than what is considered adequate to support wheat flour production at a given milling location. It would take a huge milling complex, many times larger than ConAgra's relatively small 6,000 cwt. mill at Martins Creek before ConAgra could ever seriously consider the massive undertaking of operating one elevator at Duluth-Superior for loading lakers or trainloads, a second elevator at Buffalo for unloading lakers or trainloads at Buffalo and a third elevator at the site of the Martins Creek flour mill. ConAgra has therefore had to utilize the elevator facilities of firms who already operate grain elevators at Buffalo. Actually, two flour milling firms, both of whom have elevator facilities at Duluth-Superior and also at Buffalo and both of whom happen to be protestants in this proceeding, were very eager to sell ConAgra wheat delivered in rail cars or trucks at Buffalo. That is the basis upon which ConAgra has been operating to date. These same two firms have undertaken the responsibility of booking the laker space, loading the lakers, unloading the lakers, payment of lake freight and loading out wheat into rail cars. Although ConAgra isn't really accustomed to placing complete control for the origination of grain supplies in the hands of its principal competitors, ConAgra has elected to follow this course of action because its alternatives are not economically feasible. ConAgra seeks nothing more than a fairly and competitively priced transportation alternative and an opportunity to procure its wheat supplies from firms who are not, in turn, competing against ConAgra for flour sales in eastern markets. There are a number of grain merchandising firms located at Duluth-Superior and Minneapolis who are perfectly capable of supplying grain to ConAgra and who are not flour milling competitors and are therefore more inclined to provide more responsive service to ConAgra. We know this from actual experience because we presently rely upon some of these elevator firms to supply grain to us for shipment to other areas and we know them to be reliable, dependable and to be very anxious to supply wheat to our Martins Creek flour mill.

A brief discussion of the proposed trainload rates and the basis upon which the precise rate levels here protested were reached is in order. Lake freight charges from Duluth to Buffalo were generally between 15¢ and 16¢ per bushel (or 25¢ to 26.67¢ per cwt.) during the navigation season just ended. A reputable chartering firm, with whom ConAgra deals continuously, has quoted us that lake freight level (See Appendix 2). The accuracy of that quotation is verified by the Protest and Petition For Suspension of the Soo Line-EL trainload rate filed October 19, 1973, on behalf of the Lake Carriers' Association representing firms who own and operate 172 vessels.

During the non-navigation season, or basically that period between December 15 and March 31, the most favorable rate available to move grain from Duluth-Superior and Minneapolis to Buffalo and ultimately to Martins Creek is by engaging the unit train rate of 43¢ per cwt., minimum 5,000 tons, as published in Soo Line Tariff No. 526, ICC No. 7755, from Duluth-Superior and Minneapolis to Buffalo. Beyond Buffalo to Martins Creek transportation costs to ConAgra are essentially constant throughout the year. If ConAgra uses rail, the cost is 40¢ per cwt., minimun 500 tons per shipment, via either Erie Lackawanna (per EL Tariff No.146, ICC No. 174) or via Penn Central (per PC Tariff No. 20709, ICC No. 325). If ConAgra engages the services of itinerant motor carriers from Buffalo to Martins Creek, as we have done to move 32% of our total wheat requirements in a period of seven months (May 1 to November 30), our transportation cost ranges from 20¢ to 22¢ per bushel, or 33.33¢[4/] to 36.67¢[5/] per cwt. In essence, there are four combinations of transportation that can be used to transport grain from Duluth-Superior and Minneapolis to Martins Creek and the transportation costs to ConAgra via each respective combination is as follows:

| TRANSPORTATION MODES | TOTAL TRANSPORTATION CHARGE |
|---|---|
| 1. Via laker to Buffalo, rail to Martins Creek ---------------------------- (Lake freight 25.00¢ to 26.67¢ per cwt. plus 5-car rail rate 40¢ per cwt. plus 2¢ cwt. trucking charge from Martins Creek "B" to Martins Creek "A" plant) | 67.00¢ to 68.67¢<br>(See Note 1) |

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4/ Appendix 6 is attached to illustrate copy of trucking charges paid at 20¢ per bushel or 33.33¢ per cwt.

5/ Appendix 7 is attached to illustrate copy of trucking charges paid at 22¢ per bushel or 36.67¢ per cwt.

| | | |
|---|---|---|
| 2. | Via laker to Buffalo, itinerant truck to Martins Creek------------------ (Lake freight 25.00¢ to 26.67¢ per cwt. plus truck rate 36.67¢ per cwt.) | 61.67¢ to 63.34¢ (See Note 1) |
| 3. | Via rail 5,000 ton rate to Buffalo, rail to Martins Creek------------------- (Rail freight rate 43¢ per cwt. to Buffalo, plus 5-car rail rate 40¢ per cwt. plus 2¢ per cwt. trucking charge from Martins Creek "B" to Martins Creek "A" plant) | 85.00¢ cwt. (See Note 1) |
| 4. | Via rail 5,000 ton rate to Buffalo, itinerant truck to Martins Creek------- (Rail freight rate 43¢ per cwt. to Buffalo, plus truck rate 36.67¢ per cwt.) | 79.67¢ cwt. (See Note 1) |

NOTE 1 - Transfer and elevation charge of 5¢ - 6¢ per cwt. at Buffalo is in addition to transportation charges shown.

Combinations 1 and 2 above cover ConAgra's potential transportation costs during the navigation season on the lakes and those costs range from a low of 61.67¢ per cwt. to a high of 68.67¢ per cwt. During the non-navigation season, which we have previously described as being roughly between December 15 and March 31, our transportation costs using combinations 3 and 4 increase to 79.67¢ to 85.00¢ per cwt. We added an approximate elevation and handling cost at Buffalo of 5¢ to 6¢ per cwt. (3¢ to 3.6¢ per bushel) to arrive at the through one-factor rates here under protest, namely 72.25¢[6/] per cwt. during the

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6/ Actual cost to ConAgra is 2¢ per cwt. higher than stated rate due to necessity to truck all wheat from Martins Creek "B" to Martins Creek "A" plant.

navigation season and 88.00¢[7/] per cwt. during the non-navigation season. The handling-elevation charge at Buffalo is a negotiable item, but at the rates we considered it translates to roughly $100.00 per car to load a jumbo hopper car (5¢ x 200,000 lbs.). We know that to be a reasonable charge and one which ConAgra would be willing to accept to perform the same service for another firm.

ConAgra, as a demonstrated leader in the concept of constructing flour mills near major flour consuming markets, has understandably gained valuable experience and knowledge to assist in precisely identifying delivery costs in private trucks. Appendices 3-A through 3-D illustrate our private trucking expense to reach four important flour markets within range of Martins Creek, namely, Philadelphia, Pa., Brooklyn and Jamaica, N.Y., and Hackensack, N.J. The costs illustrated on these four appendices are expressed on a standard form used by ConAgra and prepared individually for each respective customer. As the appendices show, our evaluations of truck delivery costs are comprehensive and exhaustive. Since private trucking from Martins Creek is a major expense item we put forth every conceivable effort to accurately identify our delivery costs because they must be

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[7/] See footnote 6.

(and are) reflected in our selling prices. Records are maintained and closely monitored to update and revise our rates as the basic expense items change. A review of Appendices 3-A through 3-D reveals that our trucking costs to major consuming areas served from Martins Creek range from a low of 29¢ per cwt. to a high of 34¢ per cwt. Many other destinations could be included and our costs would vary slightly; however, the preponderance of our flour production at Martins Creek is distributed to customers at destinations which fall within this 29¢ to 34¢ per cwt. range.

In an endeavor to illustrate the competitive relationship of Martins Creek vs. Buffalo we invite your attention to Appendix 4 where we have listed comparative transportation costs to the destinations of Philadelphia, Pa., Brooklyn and Jamaica, N.Y., and Hackensack, N.J. The rates reflected for shipments from Martins Creek are those applicable under the trainload rate here protested during the navigation season (April 1 through December 14). During the non-navigation season (December 15 through March 31) the total transportation cost via Martins Creek will increase by 15.75¢ per cwt. when the seasonal rate is increased from 72.25¢ per cwt. to 88¢ per cwt. It is clearly evident by the rates set forth on Appendix 4 that Buffalo can deliver carloads of flour to the destinations named at costs which are substantially below the costs incurred by

ConAgra and that advantage is even further enlarged during the period when ConAgra must observe the higher 88¢ trainload rate. The competitive relationship of Martins Creek vs. Buffalo in the New York City and/or Philadelphia flour markets is not at all complicated or difficult to comprehend. The precise degree of rate advantage for the Buffalo mills will change as ConAgra's transportation costs for the trainload movements change, but Buffalo's advantage is omnipresent.

Protestant flour millers, at page 26 and 27 of their protest and petition for suspension of the Soo Line-Erie Lackawanna trainload rate here at issue, question the wisdom of having a tariff expire on September 15th annually. They contend this practice will serve to provide ConAgra with an "outdated, unreliable water factor" for the ensuing year. I fail to see where protestant millers have afforded any recognition to the fact that the trainload rate on wheat of 43¢ per cwt. applicable from Minneapolis and Duluth to Buffalo[8/] also expires annually on September 15 and that rate is also based on precisely the same "water factor" as is the proposed rate. Thus, two tariffs with essentially identical reasons for their existence quite logically have common expiration dates.

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[8/] Rate published in Soo Line Tariff No. 526, ICC 7755.

Protestant millers also infer that cross-lake charges trend upward each year and that the direct result will be an understatement each year of the rate for the ensuing year. Attached and identified as Exhibit 5 is a detailed range of lake freight rates on grain from Duluth-Superior to Buffalo, N.Y., for the years 1966 through 1971. As has already been noted, rates are currently ranging from 15¢ to 16¢ per bushel.[9] A review of our Appendix 5 and recognition of current rate levels quickly dispels any contentions or fears that lake freight charges are sensitive to the point of being erratic or volatile. On the contrary, history of the rates over the past seven years establishes that they are very stable. During 1966, rates ranged from 10¢ to 13-1/2¢ per bushel and during calendar 1973 rates ranged from 15¢ to 16¢ per bushel, a difference of roughly 5¢ per bushel during eight shipping seasons. The freight rates on grain moving via lakers are exempt from Interstate Commerce Commission regulation; hence, they are basically in an environment where the law of supply and demand is the greatest single influence on the rate level. To quote page 10 of the protest dated October 19, 1973, filed on behalf of the Lake Carriers' Association, "vessel rates ----- are determined in the open market on the basis of the law of supply and demand in an atmosphere of free and open competition." The possibility of the rates via lakers fluctuating wildly, either up or down, seems rather remote in view of the recent history of relative stability. The possibility of lake rates increasing suddenly seems even more remote when one takes into account statements such as that appearing on page 2 of the protest filed on October 19, 1973, on behalf of the Lake Carriers' Association wherein it states that "Buffalo receipts of grain have not been lower since 1885." The protest filed on October 19, 1973, on behalf of Niagara Frontier Transportation Authority reflects an identical word for word statement at page 2. These factors strongly suggest that there will be continued stability in lake rates and the September 15 expiration date of the tariff here protested, as well as Soo Line Tariff No. 526, ICC 7755, publishing the trainload rate to Buffalo, presents no opportunity for possible abuse.

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[9] See page 4 of Petition for Suspension dated October 19, 1973, filed on behalf of Lake Carriers' Association who own and operate 172 vessels.

ConAgra's concept of erecting flour mills near consuming markets is repeatedly characterized as "new", as "revolutionary", as "something that will be disruptive of traditional marketing patterns and policies." We submit that what ConAgra is doing with its Martins Creek flour mill is already an established way of life in practically every other heavily populated region of the United States. It is new and revolutionary only to the

Philadelphia and New York City areas, not to other sectors of the United States. Below is a list of several major metropolitan areas, the number of flour mills operating at those specific locations and the combined daily flour production at each specific point:

| CITY [10/] | NUMBER OF FLOUR MILLS | TOTAL DAILY FLOUR MILLING CAPACITY |
|---|---|---|
| Chicago, Ill. | 2 | 14,500 cwts. |
| St. Louis, Mo.-Alton, Ill. | 2 | 33,000 cwts. |
| Los Angeles, Calif. | 5 | 22,000 cwts. |
| Oakland, Calif. | 1 | 6,500 cwts. |
| Denver, Colo. | 2 | 14,200 cwts. |
| Portland, Oreg. | 2 | 13,000 cwts. |
| Seattle, Wash. | 2 | 15,250 cwts. |
| Culpeper, Va. | 1 | 10,500 cwts. |
| Jacksonville, Fla. | 1 | 5,500 cwts. |
| Tampa, Fla. | 1 | 4,000 cwts. |
| Charlotte, N.C. | 1 | 8,500 cwts. |

The above is by no means a comprehensive list of flour mills operating in all heavily populated areas. On the contrary, it's merely a sampling of mill locations to support my comment that "destination flour mills" are common in numerous heavily populated areas, other than New York City-Philadelphia. The

---

[10/] Source Milling & Baking News, September 1973.

flour milling firms who are protesting the rate here at issue actually operate many of the above identified mills.

In summary, and to reiterate my earlier comment, ConAgra is seeking a competitively priced transportation alternative. We do not want to be "locked in" to any single mode or method of originating the wheat needed for our Martins Creek flour mill. We do have a very strong desire to reduce our exposure to the Buffalo rail terminal, which is frequently in a deplorable state of congestion and confusion. Our experience in receiving carload shipments of wheat from shippers in the Buffalo terminal has at times been highly unsatisfactory. We have encountered very serious terminal delays, part of which can be attributed to the congestion of the railroad yards and part of which can be attributed to the inability of one of our two Buffalo suppliers to unload lakers and load out rail cars simultaneously. If that particular shipper is unloading grain from a laker, rail cars must sit idle until the vessel is unloaded. That is a situation ConAgra finds highly undesirable, most particularly at a time when there is a critical shortage of covered hopper grain cars. We tolerate it only because it's largely a situation over which we have no control. ConAgra can not control its supplier, it has no control over operation of the railroads in Buffalo and its alternative of originating single cars of wheat from midwestern producing points is economically prohibitive. Our Martins Creek plant has been on the verge of complete shutdown on several occasions because of the overall service problem at Buffalo. We want and need at least the choice to avoid the chaotic terminal situation at Buffalo at competitively priced rate levels. The proposal of Soo-Erie Lackawanna here at issue would afford us that opportunity.

# VERIFICATION

STATE OF NEBRASKA ]
                  ] SS
COUNTY OF DOUGLAS ]

Donald J. Stone, being first duly sworn, on oath states that he has read the foregoing statement, knows the contents thereof, and that the same are true and correct as stated.

Donald J. Stone

Donald J. Stone

SUBSCRIBED AND SWORN to before me this 14th day of December, 1973.

Dorothy E. Sorensen

Notary Public

Exhibit 1

# IDENTIFICATION AND RATED CAPACITIES OF ALL WHEAT FLOUR MILLS OPERATING AT BUFFALO, NEW YORK

| COMPANY | DAILY WHEAT FLOUR MILLING CAPACITY IN HUNDREDWEIGHTS* (1) | ELEVATOR WHEAT STORAGE CAPACITY* |
|---|---|---|
| International Multifoods Corp. | 21,700 cwts. | 4,660,000 bu. |
| The Pillsbury Company | 17,300 cwts. | 2,700,000 bu. |
| Standard Milling Company | 12,000 cwts. | 5,080,000 bu. |
| General Mills, Inc. | 12,000 cwts. | 5,000,000 bu. |
| Peavey Company Flour Mills | 10,500 cwts. | 3,250,000 bu. |
| Seaboard Allied Milling Corp. | 10,400 cwts. | 180,000 bu. |
| GRAND TOTALS | 83,900 cwts. | 20,870,000 bu. |

*Information sources - Milling & Baking News Magazine dated September 1973.

(1) Milling capacity represents hundredweights of flour produced in 24 hour period.

MAXWELL HARRIS COMPANY, INC.

*Chartering Brokers*

FOREIGN · · COASTWISE

TELETYPEWRITERS
TWX 710-581-4747
RCA 223230
CABLE ADDRESS
"HARMARSHIP"

19 RECTOR STREET
NEW YORK, N. Y. 10006
TEL. 212 - 422-1005

October 12, 1973

Mr. Donald Stone
General Traffic Manager
ConAgra, Inc.
500 Kiewit Plaza
Omaha, Nebraska 68131

Dear Don:

Confirming our conversation, freight from Duluth to Buffalo over this 1973 has been going between 15/16¢ per bushel and there is still some space available.

Very truly yours,

MAXWELL HARRIS COMPANY, INC.

Donald E. Harris

DEH/hs

## RATE COMPUTATION SHEET

PRODUCT BULK FLOUR

ADDRESS Philadelphia, Pa.

ORIGIN: MCA

| | | |
|---|---|---|
| MILES | 150 | See Note 1 |
| LABOR HRS. | 7 | See Note 2 |
| CWT | 450 | |
| FIXED COST | 60.88 | See Note 3 |
| MAINT. COST | 12.00 | See Note 4 |
| FUEL COST | 9.00 | See Note 5 |
| BULK TRUCK CLNG. | 6.45 | See Note 6 |
| DRIVER LABOR | 34.76 | See Note 7 |
| HELPER LABOR | | |
| OUTSIDE LABOR | | |
| TOLLS | 8.00 | See Note 8 |
| MEALS | | |
| LODGING | | |
| MISCELLANEOUS | | |
| TOTAL COST | 131.09 | See Note 9 |
| RATE/CWT | .29 | See Note 10 |

NOTES

1 - Actual round trip highway mileage from Martins Creek, Pa.

2 - Labor hours stated based on actual experience. Figure includes all driving time and time consumed in unloading bulk trailer.

3 - Actual calculation of equipment leasing costs of $48.16 daily for tractor and pneumatic trailer plus insurance and license $3.72 daily, plus $1.00 for truck washing plus $1.00 for shop equipment depreciation plus $7.00 for administration and supervision.

4 - Based on 6¢ per mile for tractor and 2¢ per mile on trailer.

5 - Based on average of 4.8 miles per gallon and fuel cost of 29¢ per gallon.

6 - Based on our actual experience throughout U.S. of cleaning each bulk trailer interiorly after each load.

7 - Based on paying our drivers 16¢ per continuous mile plus $3.58 per hour for time spent preparing trailer for unloading, actual unloading process and preparation to return to Martins Creek, plus 20% for fringe benefits. Total cost reflects our actual experience.

8 - Based on actual freeway tolls paid by ConAgra in trucking flour to this destination.

9 - Figure represents sum total of expenses actually incurred by ConAgra.

10 - Figure represents total cost divided by average payload of 45,000 lbs. per shipment to arrive at per cwt. cost.

# RATE COMPUTATION SHEET

PRODUCT BULK FLOUR

ADDRESS BROOKLYN, N.Y.

ORIGIN: MCA

| | | |
|---|---|---|
| MILES | 176 | See Note 1 |
| LABOR HRS. | 8 | See Note 2 |
| CWT | 450 | |
| FIXED COST | 60.88 | See Note 3 |
| MAINT. COST | 14.08 | See Note 4 |
| FUEL COST | 10.56 | See Note 5 |
| BULK TRUCK CLNG. | 6.45 | See Note 6 |
| DRIVER LABOR | 42.63 | See Note 7 |
| HELPER LABOR | | |
| OUTSIDE LABOR | | |
| TOLLS | 14.00 | See Note 8 |
| MEALS | 1.25 | |
| LODGING | | |
| MISCELLANEOUS | | |
| TOTAL COST | 149.85 | See Note 9 |
| RATE/CWT | .33 | See Note 10 |

NOTES

1 - Actual round trip highway mileage from Martins Creek, Pa.

2 - Labor hours stated based on actual experience. Figure includes all driving time and time consumed in unloading bulk trailer.

3 - Actual calculation of equipment leasing costs of $48.15 daily for tractor and pneumatic trailer plus insurance and license $3.72 daily, plus $1.00 for truck washing plus $1.00 for shop equipment depreciation plus $7.00 for administration and supervision.

4 - Based on 6¢ per mile for tractor and 2¢ per mile on trailer.

5 - Based on average of 4.8 miles per gallon and fuel cost of 29¢ per gallon.

6 - Based on our actual experience throughout U.S. of cleaning each bulk trailer interiorly after each load.

7 - Based on paying our drivers 16¢ per continuous mile plus $3.68 per hour for time spent preparing trailer for unloading, actual unloading process and preparation to return to Martins Creek, plus 20% for fringe benefits. Total cost reflects our actual experience.

8 - Based on actual freeway tolls paid by ConAgra in trucking flour to this destination.

9 - Figure represents sum total of expenses actually incurred by ConAgra.

10 - Figure represents total cost divided by average payload of 45,000 lbs. per shipment to arrive at per cwt. cost.

# RATE COMPUTATION SHEET

PRODUCT BULK FLOUR

ADDRESS HACKENSACK, N.J.

ORIGIN: MCA

| | | |
|---|---|---|
| MILES | 170 | See Note 1 |
| LABOR HRS. | 7½ | See Note 2 |
| CWT | 450 | |
| FIXED COST | 60.88 | See Note 3 |
| MAINT. COST | 13.60 | See Note 4 |
| FUEL COST | 10.20 | See Note 5 |
| BULK TRUCK CLNG. | 6.45 | See Note 6 |
| DRIVER LABOR | 41.48 | See Note 7 |
| HELPER LABOR | | |
| OUTSIDE LABOR | | |
| TOLLS | 2.50 | See Note 8 |
| MEALS | | |
| LODGING | | |
| MISCELLANEOUS | | |
| TOTAL COST | 135.11 | See Note 9 |
| RATE/CWT | .30 | See Note 10 |

NOTES

1 - Actual round trip highway mileage from Martins Creek, Pa.

2 - Labor hours stated based on actual experience. Figure includes all driving time and time consumed in unloading bulk trailer.

3 - Actual calculation of equipment leasing costs of $48.15 daily for tractor and pneumatic trailer plus insurance and license $3.72 daily, plus $1.00 for truck washing plus $1.00 for shop equipment depreciation plus $7.00 for administration and supervision.

4 - Based on 6¢ per mile for tractor and 2¢ per mile on trailer.

5 - Based on average of 4.8 miles per gallon and fuel cost of 29¢ per gallon.

6 - Based on our actual experience throughout U.S. of cleaning each bulk trailer interiorly after each load.

7 - Based on paying our drivers 15¢ per continuous mile plus $3.68 per hour for time spent preparing trailer for unloading, actual unloading process and preparation to return to Martins Creek, plus 20% for fringe benefits. Total cost reflects our actual experience.

8 - Based on actual freeway tolls paid by ConAgra in trucking flour to this destination.

9 - Figure represents sum total of expenses actually incurred by ConAgra.

10 - Figure represents total cost divided by average payload of 45,000 lbs. per shipment to arrive at per cwt. cost.

Exhibit -D

686a

## RATE COMPUTATION SHEET

PRODUCT BULK FLOUR

ADDRESS Jamaica, N.Y.

ORIGIN: MCA

| | | | |
|---|---|---|---|
| MILES | 188 | | See Note 1 |
| LABOR HRS. | 8 | | See Note 2 |
| CWT | 450 | | |
| FIXED COST | | 60.88 | See Note 3 |
| MAINT. COST | | 15.04 | See Note 4 |
| FUEL COST | | 11.28 | See Note 5 |
| BULK TRUCK CLNG. | | 6.45 | See Note 6 |
| DRIVER LABOR | | 44.94 | See Note 7 |
| HELPER LABOR | | | |
| OUTSIDE LABOR | | | |
| TOLLS | | 14.00 | See Note 8 |
| MEALS | | 1.25 | |
| LODGING | | | |
| MISCELLANEOUS | | | |
| TOTAL COST | | 153.84 | See Note 9 |
| RATE/CWT | | .34 | See Note 10 |

NOTES

1 - Actual round trip highway mileage from Martins Creek, Pa.

2 - Labor hours stated based on actual experience. Figure includes all driving time and time consumed in unloading bulk trailer.

3 - Actual calculation of equipment leasing costs of $48.16 daily for tractor and pneumatic trailer plus insurance and license $3.72 daily, plus $1.00 for truck washing plus $1.00 for shop equipment depreciation plus $7.00 for administration and supervision.

4 - Based on 6¢ per mile for tractor and 2¢ per mile on trailer.

5 - Based on average of 4.8 miles per gallon and fuel cost of 29¢ per gallon.

6 - Based on our actual experience throughout U.S. of cleaning each bulk trailer interiorly after each load.

7 - Based on paying our drivers 16¢ per continuous mile plus $3.68 per hour for time spent preparing trailer for unloading, actual unloading process and preparation to return to Martins Creek, plus 20% for fringe benefits. Total cost reflects our actual experience.

8 - Based on actual freeway tolls paid by ConAgra in trucking flour to this destination.

9 - Figure represents sum total of expenses actually incurred by ConAgra.

10 - Figure represents total cost divided by average payload of 45,000 lbs. per shipment to arrive at per cwt. cost.

## COMPETITIVE RELATIONSHIP OF MARTINS CREEK, PENNSY NIA VS. BUFFALO, NEW YORK ON WHEAT ORIGINATED AT DULUTH, MINNESOTA AND MILLED AT THOSE POINTS I WHEAT FLOUR AND SHIPPED TO DESTINATIONS SPECIFIED VIA PRIVATE TRUCK WHEN FROM MARTINS CREEK AND VIA SINGLE CAR RAIL RATES WHEN OM BUFFALO

### TO PHILADELPHIA, PENNSYLVANIA

| FROM MARTINS CREEK, PA. | FROM BUFFALO, N. Y. |
|---|---|
| $ .7225 cwt. (See Note 1) | $.3000 cwt. (See Note 3) |
| .0200 cwt. (See Note 2) | .5800 cwt. (See Note 4) |
| .2900 cwt. Trucking Cost of Flour (See Exhibit 3-A ) | |
| $1.0325 cwt. Total Cost | $.8800 cwt. Total Cost |

### TO BROOKLYN, NEW YORK

| FROM MARTINS CREEK, PA. | FROM BUFFALO, N. Y. |
|---|---|
| $ .7225 cwt. (See Note 1) | $.3000 cwt. (See Note 3) |
| .0200 cwt. (See Note 2) | .5800 cwt. (See Note 4) |
| .3300 cwt. Trucking Cost of Flour (See Exhibit 3-B ) | |
| $1.0725 cwt. Total Cost | $.8800 cwt. Total Cost |

### TO HACKENSACK, NEW JERSEY

| FROM MARTINS CREEK PA. | FROM BUFFALO, N. Y. |
|---|---|
| $ .7225 cwt. (See Note 1) | $.3000 cwt. (See Note 3) |
| .0200 cwt. (See Note 2) | .5800 cwt. (See Note 4) |
| .3000 cwt. Trucking Cost of Flour (See Exhibit 3-C ) | |
| $1.0425 cwt. Total Cost | $.8800 cwt. Total Cost |

### TO JAMAICA, NEW YORK

| FROM MARTINS CREEK, PA. | FROM BUFFALO, N. Y. |
|---|---|
| $ .7225 cwt. (See Note 1) | $.3000 cwt. (See Note 3) |
| .0200 cwt. (See Note 2) | .5800 cwt. (See Note 4) |
| .3400 cwt. Trucking Cost of Flour (See Exhibit 3-D ) | |
| $1.0825 cwt. Total Cost | $.8800 cwt. Total Cost |

NOTE 1 - Rate on wheat from Duluth to Martins Creek "B" plant. Tariff authority Soo Line Tariff 543 ICC No. 7837

NOTE 2 - Rate represents private trucking cost on wheat from Martins Creek "B" on rail to Martins Creek "A" which isn't on rail.

NOTE 3 - Buffalo millers have previously stated that summer wheat freight costs using lakers and winter freight costs using rail trainload rates from Duluth produces year round average of 30¢ cwt. (See Page 8-B of Petition for Suspension dated 9/5/72 in I&S Docket 8784 filed on behalf of protesting flour millers group, General Mills, Inc. et al.

NOTE 4 - Single car wheat flour rate, minimum 50,000 lbs. per car, published in Penn Central Transportation Co. Tariff No. 20710, ICC No. 333. Stated rate is on Ex Parte 299 level, ICC No. C-984.

BEST COPY AVAILABLE

EXHIBIT 5

## Lake Freight Rates on Wheat to Lake Erie Ports

1966

| | | | |
|---|---|---|---|
| Opening to April 25 | .11 | November 21 to November 30 | .12 |
| April 29 to October 15 | .10 | December 1 to December 5 | .12½ |
| October 16 to November 10 | .10½ | December 6 to December 10 | .12¾ |
| November 11 to November 20 | .11 | December 11 to Close | .13½ |

1967

| | | | |
|---|---|---|---|
| Opening to May 31 | .11 | Last Half of November | .11 |
| June 1 to July 14 | .10½ | First Week December | .12 |
| July 15 to November 14 | .10 | Second Week December to Close | .13 |

1968

| | | | |
|---|---|---|---|
| Opening to May 20 | .11½ | Nov. 17 to Nov. 26 | .11¾ |
| May 21 to Aug. 25 | .11 | Nov. 27 to Dec. 1 | .12 |
| Aug. 26 to Aug. 29 | .10¾ | Dec. 2 to Dec. 4 | .13 |
| Aug. 30 to Nov. 4 | .10 | Dec. 5 to Dec. 12 | .15 |
| Nov. 5 to Nov. 12 | .10½ | Dec. 13 to Close | .16 |
| Nov. 13 to Nov. 16 | .11 | | |

1969

| | | | |
|---|---|---|---|
| Opening to July 29 | .12 | Sept. 22 to Oct. 7 | .14 |
| July 30 to Aug. 11 | .12½ | Oct. 8 to Nov. 23 | .14½ |
| Aug. 12 to Aug. 18 | .12¾ | Nov. 24 to Nov. 29 | .15½ |
| Aug. 19 to Sept. 2 | .13 | Nov. 30 | .16 |
| Sept. 3 to Sept. 21 | .13½ | Dec. 1 to Close | .16½ |

1970

| | | | |
|---|---|---|---|
| Opening to Nov. 27th | .14 | Nov.28 to Dec. 13 | .16 |
| Dec. 14 to Close | .16 | | |

1971

| | | | |
|---|---|---|---|
| Opening to Nov. 20 | .14½ | Dec. 1 to Dec. 7 | .16 |
| Nov. 21 to Nov. 30 | .16 | Dec. 8 to Close | .17 |

Above is zerox copy of Page 6 of the Annual Report of the Duluth Board of Trade, Duluth, Minnesota for the year ending December 31, 1971.

Exhibit 6

**INVOICE**

No. 9656

# LOVATT AND COMPANY, INC.

*Grain & Feed Merchants & Brokers*

40 E. BUTLER PIKE • AMBLER, PA. 19002
(215) 643-5630 • 5631 • CH 2-3538,

CON-AGRA INC.
SANDTS EDDY, PA. 18042

| | |
|---|---|
| INVOICE DATE | 5-21-73 |
| OUR ORDER NO. | |
| YOUR ORDER NO. | |
| TERMS | |
| F.O.B. | |
| SALESMAN | |
| SHIPPED VIA | TRUCKS |
| SHIPPED TO | |
| PPD. OR COL | |

| QUANTITY | DESCRIPTION | PRICE | AMOU |
|---|---|---|---|
| | FREIGHT ON FOLLOWING: ~~[illegible]~~ 616180 LBS. =10269.67 BUS.@.20 ok | | $205 OK |

| DATE | CON-AGRA # | LBS. | |
|---|---|---|---|
| 5-4 | 3787 | 46140 | |
| 5-3 | 3990 | 44320 | |
| 5-5 | 4006 | 47160 | |
| 5-4 | 4007 | 49560 | |
| 5-4 | 4008 | 38120 | |
| 5-8 | 4009 | 47830 | |
| 5-8 | 4020 | 40080 | |
| 5-8 | 4021 | 42980 | |
| 5-8 | 4023 | 46700 | |
| 5-10 | 4040 | 42160 | |
| 5-10 | 4041 | 40600 | 5-8 TKT. LOST 43350 |
| 5-8 | 4056 | 41900 | |
| 5-4 | 4079 | 45280 | |

FORM 1400, REGENT FORMS, PENNSAUKEN, N.J. 08109

Exhibit 7

# INVOICE

No. 9777

**LOVATT AND COMPANY, INC.**

*Grain & Feed Merchants & Brokers*

40 E. BUTLER PIKE • AMBLER, PA. 19002

(215) 643-5630 • 5631 • CH 2-3538

CON-AGRA, INC.
SANDTS EDDY, PA. 18042

| | |
|---|---|
| INVOICE DATE | 6-7-73 |
| OUR ORDER NO | |
| YOUR ORDER NO. | |
| TERMS | |
| F.O.B. | |
| SALESMAN | SUTTON |
| SHIPPED VIA | |

PED TO

PPD OR COL

| QUANTITY | DESCRIPTION | PRICE | AMOUNT |
|---|---|---|---|
| | FREIGHT ON FOLLOWING TRUCKS 4538.33 BU. @22/BU. | | $998.43 |

| DATE | TK.# | LBS. |
|---|---|---|
| 5-24 | 4152 | 46160 ✓ |
| | 4153 | 44040 ✓ |
| (GENEVA #) | 4526 | 43280 ✓ |
| 5-29 | 4165 | 48040 ✓ |
| 5-31 | 4182 | 43480 ✓ |
| 6-4 | 4215 | 47300 ✓ |
| | | 272300# = 4538.33 BUSHELS |

ok

6TN

RM 1400, REGENT FORMS, PENNSAUKEN, N.J. 08109

### BEFORE THE
### INTERSTATE COMMERCE COMMISSION

---

I & S No. 8899

UNIT TRAIN RATES ON WHEAT, MINN.
& WISC., TO MARTINS CREEK, PA.

---

## VERIFIED STATEMENT
## OF
## OLIVER T. BURNHAM

---

I am Oliver T. Burnham, former Vice President and Secretary of Lake Carriers' Association. I retired in October of 1973 after having served with the Association some forty years, being Secretary since 1939 and Secretary-Vice President since 1953. In my capacity as Secretary and Vice President it was my primary responsibility each year to make a statistical analysis of the Great Lakes bulk commodity movement, including such commodities as iron ore, coal, grain, limestone, sand, cement and petroleum products.

As of year's end 1972, Lake Carriers' Association consisted of some 15 separate managements owning and operating a total of 172 vessels documented under the laws of the United States and engaged in trade and commerce upon the waters of the Great Lakes. The vessels of member companies enrolled in Lake Carriers' Association constituted better than 98% of the total

Any of your members transport any grain under the regulatory jurisdiction of this Commission? Any records to substantiate that

Even a single bill of lading! That is because your members have never moved as much as a bushel of grain subject to this Com jurisdiction, isn't it!

trip carrying capacity of the United States flag Great Lakes fleet and vessels of Association members transported better than 95% of the total United States domestic commerce of the Great Lakes.

For the most part, Great Lakes vessels are of special purpose and design and therefore limited to the movement of bulk commodities, one of the most important of which is grain. During 1972, the last year for which statistics are available, grain shipments from United States and Canadian lake ports reached an all-time peak of 965,123,848 bushels. Unfortunately, however, participation by United States vessels in the grain movement remained at meager levels, the domestic volume (reserved to U. S. vessels by the cabotage laws) having been only 60,479,001 bushels, or 6.27% of the total Great Lakes grain movement. Of this total domestic movement, all originated at Duluth-Superior and 96.5% or 58,354,766 bushels ~~terminated at~~ consigned to Buffalo, New York. Consequently, to the extent Great Lakes vessels are dependent upon the domestic grain movement, they are inevitably tied to the port of Buffalo, which has the largest flour milling capacity in the nation. Attached as Exhibit A to my statement are pages 77 through 94 of Lake Carriers' Association's 1972 Annual Report, detailing the Great Lakes grain trade.

[illegible] of [illegible] the [illegible] 1972 [illegible] various problems would require to be handled by you! [illegible] shippers [illegible] choice [illegible]

58 million tons of grain to Buffalo. You understand that the best railroads in [illegible] do understand which is 105,100 tons! would still leave you with 58,249,766, and you don't think that is a [illegible]

Nearly all of the grain milled at Buffalo moves via lake vessel from Duluth and Superior to Buffalo where the receiving elevators are lake oriented. In turn, the milling facilities at Buffalo are largely dependent on eastern markets such

693a

From "Navy oil" to only 260ish 99.9%?

as Philadelphia and New York. Now the Soo Line Railroad Company, in conjunction with the Erie Lackawanna Railway Company, desires to further restrict the domestic Great Lakes grain movement by publication of a through train rate to Martins Creek, Pennsylvania.

In my humble judgment, the responsibility of the Commission to the public is much more than determining whether or not a rate is compensatory. There are many facets to the public interest, not the least of which are the energy crisis and the railroad car shortage. ~~The Oak Ridge~~ National ~~Laboratory~~ Report ~~on Energy Intensiveness of Transportation~~ excerpted in the N.Y. Journal of Commerce ~~reported on May 21, 1973 that~~ said ~~railroads move 200 ton miles of freight per gallon of diesel fuel.~~ My calculations indicate, however, that Great Lakes bulk cargo vessels transport 495 ton miles of cargo on a gallon of ~~diesel~~ oil fuel. More importantly, however, most Great Lakes vessels engaged in the movement of grain utilize coal for fuel. Consequently, there is involved much more than merely the price of transporting grain to Martins Creek. The Commission, in my judgment, is charged with the responsibility of examining all viable transportation alternatives so as to provide the most efficient transportation service, not only in terms of dollar cost but also in terms of energy conservation and efficiency of utilization of transportation facilities.

ok

mention strike

[illegible]

With respect to the railroad freight car shortage, it is obvious that the through movement of grain from Duluth-Superior to Martins Creek represents a duplication of car service.

[illegible]

If, in reality, the freight car shortage is of concern to the Erie Lackawanna and the Soo Line, isn't it more reasonable to ship the subject grain via lake vessel from the head of the lakes to Buffalo, thus freeing the covered hopper cars utilized in the movement of grain from the head of the lakes to Buffalo for other service? In light of the railroad freight car shortage, the true objective of the Commission must be to determine what, in the public interest, is the most economical mode of transportation. Grain is a fungible commodity where immediate dispatch is not of significance. [Thus it becomes obvious that lake-rail transportation of this grain offers the most viable transportation media at the least cost to the general public.] ← still

any idea how much it costs to own grain today

[illegible] Mpls — [illegible]

Conagra has made the assertion that it is impossible to unload a lake vessel and at the same time transfer grain to railroad cars for movement beyond. The history of the Buffalo grain movement demonstrates that this simply is not true. The Standard Elevator in Buffalo offers a typical example. For many years it has been customary at that facility to elevate grain from a lake vessel, pass it through the elevator and load it directly into cuts of five or six cars each. The only delays occur during the time the switch engine is shuttling in and out the custs. During this time, however, the grain is stored in a bin so that the alleged delay is not the result of the vessel or the elevator but the railroad. Incidentally, the Standard Elevator is served directly by the Erie Lackawanna Railway, whereas most of the other elevators in Buffalo are served by

Bill Gegenn is the man who runs that elevator isn't he?! And the Goebels that Mr. Gygenn uses the same crews to unload vessels to load rail cars in it?! So what then they can [illegible] signal the Goebels that they don't do it?

[illegible]

the Buffalo Creek Railroad, a ~~wholly~~ partly owned subsidiary of the Erie Lackawanna.

Conagra has sought to justify in large measure its need for a unit train rate from the head of the lakes to Martins Creek on the alleged inefficiencies of the railroad switching system in Buffalo. What it fails to recognize, however, is that these alleged deficiencies are attributable to the Erie's ~~wholly~~ partly owned subsidiary, the Buffalo Creek Railroad.

what is basis for conclusion that Conagra has failed to recognize?

[All things considered, it would seem to be apparent that the rate here proposed is not justified in the public interest since lake-rail transportation to Martins Creek offers the most viable transportation alternative in view of the energy crisis, the railroad car shortage and the general transportation needs of the public.]

move to strike pure argument.

STATE OF OHIO )
SS.
CUYAHOGA COUNTY )

OLIVER T. BURNHAM, being first duly sworn, on oath states that he has read the foregoing statement, knows the contents thereof, and that the same are true and correct as stated.

Oliver T Burnham

SUBSCRIBED AND SWORN to before me this 14th day of January, 1974.

Scott H Elder
Notary Public

SCOTT H. ELDER, Attorney
Notary Public For The State of Ohio

697a (EXHIBIT A)

# ANNUAL REPORT
## OF THE
## LAKE CARRIERS' ASSOCIATION
## 1972

- EXTRACT -

PAGES 77 TO 94

| | | | |
|---|---|---|---|
| 1968 | 66 | 12,834,425 | 92,786,455 |
| 1969 | 71 | 13,149,104 | 95,475,183 |
| 1970 | 69 | 13,872,812 | 99,904,812 |
| 1971 | 65 | 13,348,607 | 96,512,297 |
| 1972 | 44 | 13,766,349 | 102,388,191 |

## THE GRAIN TRADE

Continuing the 1971 pattern, the Great Lakes grain trade represented the only major phase of the industry to establish new volume records during the year. Thus, total shipments of 965,123,848 bushels expanded nearly 57.6 million bushels from the preceding year's level and represented a tonnage equivalent of 26,692,466 net tons.

U. S. participation in the grain trade remained at minimum levels with 154 cargoes having handled 61,512,959 bushels.

The major propelling force toward establishing the new record was the increased participation of foreign vessels loading at lake ports for direct movement overseas. In that category there were a total of 613 cargoes representing the equivalent of 280,590,131 bushels. In both components of the foreign trade, new records were established primarily as a result of record-breaking sales to Iron Curtain countries.

It is unique that individual loading port records were achieved by Thunder Bay with 562,755,987 bushels and Huron with 2,115,581 bushels. Thus, the largest and smallest volume ports in the grain trade were those which reached new peaks.

In the destination section of the report, it will be noted that receipts at U. S. destinations were only 62,620,280 bushels comparing with 62,528,524 bushels in 1971. Thus, forwardings for these ports represented 6.49% of total grain shipments.

In the Canadian trade, it is interesting to note that receipts expanded at five ports, while volume receded slightly at St. Lawrence River transfer points. With the large export volume, it was surprising that receipts in the latter area were not in an expanding phase. However grain in that range of destinations was 506,835,136 bushels. This figure compared with 506,860,556 bushels handled during the preceding year and represented 83.9% of total receipts in Canada.

Despite record breaking grain shipments, no revision in single cargo records was noted. This represented the first time since 1948 when one of the grain trade component cargoes did not reach a new peak.

The appended summary provides figures relating to grain forwardings during 1971 and 1972 with division by variety and bushels. No buckwheat was reported in 1972 and the heading for sample grain has been deleted.

| | 1972<br>Bushels | 1971<br>Bushels |
|---|---|---|
| Wheat | 459,950,349 | 409,380,122 |
| Oats | 38,878,180 | 32,692,571 |
| Barley | 216,643,505 | 193,158,952 |
| Corn | 137,561,591 | 123,321,836 |
| Rye | 11,641,198 | 10,746,540 |
| Flax | 24,550,659 | 19,005,327 |
| Soybeans | 64,300,253 | 108,604,636 |
| Screenings | 11,597,713 | 10,490,585 |
| Buckwheat | — | 171,874 |
| | 965,123,548 | 907,545,443 |

For ready reference a tabulation summarizing port shipments of grain by bushels, net tons, and varieties, is included herewith. All of the loading ports continued active in 1972. In the aggregate, grain volume was 6.35% above the previous year's record.

| | Bushels | Net Tons |
|---|---|---|
| **Lake Michigan** | | |
| *From Chicago-South Chicago:* | | |
| Wheat | 948,000 | 28,440 |
| Corn | 46,298,000 | 1,296,344 |
| Soybeans | 21,397,000 | 641,910 |
| | 68,643,000 | 1,966,694 |
| *From Milwaukee:* | | |
| Barley | 103,800 | [illegible],491 |
| Corn | 15,016,832 | 420,471 |
| Soybeans | 952,650 | 28,579 |
| | 16,073,282 | 451,541 |
| **Lake Superior** | | |
| *From Duluth-Superior:* | | |
| Wheat | 122,193,280 | 3,665,799 |
| Oats | 8,288,043 | 132,607 |
| Barley | 47,106,775 | 1,130,563 |
| Rye | 7,208,729 | 201,844 |
| Flax | 10,127,283 | 283,564 |
| Corn | 20,439,480 | 572,306 |
| Soybeans | 1,686,790 | 50,604 |
| | 217,050,330 | 6,037,286 |
| *From Thunder Bay:* | | |
| Wheat | 332,279,362 | 9,968,383 |
| Oats | 30,590,137 | 489,442 |
| Barley | 169,432,930 | 4,066,390 |
| Rye | 4,432,469 | 124,109 |
| Flax | 14,423,376 | 403,856 |
| Screenings | 11,597,713 | 278,346 |
| | 562,756,987 | 15,330,524 |
| **Lake Huron** | | |
| *From Saginaw:* | | |
| Wheat | 375,000 | 11,250 |
| Corn | 3,340,300 | 93,780 |
| Soybeans | 1,485,112 | 44,553 |
| | 5,200,412 | 149,583 |
| *From Wallaceburg:* | | |
| Wheat | 881,757 | 26,452 |
| Corn | 3,477,379 | 97,367 |
| Soybeans | 245,120 | 7,354 |
| | 4,604,256 | 131,173 |
| **Lake Erie** | | |
| *From Toledo:* | | |
| Wheat | 3,273,000 | 98,190 |
| Corn | 48,981,000 | 1,371,468 |
| Soybeans | 26,418,000 | 1,092,540 |
| | 88,672,000 | 2,562,198 |
| *From Huron:* | | |
| Soybeans | 2,115,581 | 63,487 |
| TOTAL | 965,123,848 | 26,692,456 |

## Lake Grain Shipments by Variety

With the record-breaking grain trade, it is interesting to observe that forwardings of each of the principal staples exceeded 1971 volume with the exception of soybeans. Uniquely, however, barley was the only grain to establish an all-time season record at 216,643,505 bushels, thus bettering the 200-million bushel level for the first time. In addition, flax shipments of 24,550,659 bushels nearly equaled the 1957 record.

The marked reduction of 44.3 million bushels in soybean forwardings was related primarily to harvest difficulties in the mid-west area. Excessive precipitation during the fall months seriously delayed combining of soybeans and, thus, they were not made available to terminal elevators in the normal sequence. The impressive overall grain volume was related to unusually large purchases by foreign users, including Russia.

The appended tabulation provides figures concerning shipments of the major grains during each year commencing 1945. Asterisks indicate record seasons.

| | Wheat | Corn | Oats | Rye | Barley | Flax | Soy Beans |
|---|---|---|---|---|---|---|---|
| 1972 | 459,950,349 | 137,561,991 | 38,878,180 | 11,641,198 | *216,643,505 | 24,550,659 | 64,300,253 |
| 1971 | 409,380,122 | 122,929,836 | 32,692,571 | 10,746,540 | 193,158,952 | 19,005,327 | *108,604,636 |
| 1970 | 380,056,029 | 108,311,640 | 59,224,227 | 4,539,465 | 199,301,419 | 15,564,474 | 94,056,336 |
| 1969 | 270,602,701 | 131,748,910 | 26,193,080 | 4,116,977 | 66,912,334 | 16,647,795 | 66,926,669 |
| 1968 | 292,326,510 | 127,656,553 | 30,115,464 | 5,650,349 | 43,683,141 | 15,607,167 | 56,456,510 |
| 1967 | 331,015,853 | 86,691,704 | 54,400,635 | 8,104,903 | 87,291,830 | 17,826,765 | 44,748,819 |
| 1966 | *519,864,490 | 138,591,869 | 67,722,421 | 12,086,250 | 75,808,553 | 22,088,924 | 56,827,971 |
| 1965 | 402,436,819 | *144,886,363 | 75,086,570 | 5,693,142 | 83,416,323 | 16,040,246 | 59,318,455 |
| 1964 | 427,581,600 | 135,784,674 | 42,164,931 | 8,047,587 | 78,521,531 | 17,104,215 | 51,302,627 |
| 1963 | 365,793,821 | 116,074,256 | 55,907,511 | 13,161,502 | 74,711,225 | 11,578,590 | 38,606,776 |
| 1962 | 271,589,605 | 113,701,518 | 55,852,807 | 16,586,504 | 65,233,889 | 13,498,940 | 29,653,072 |
| 1961 | 357,052,499 | 78,474,629 | 45,168,470 | 7,435,863 | 61,740,640 | 12,600,907 | 26,785,314 |
| 1960 | 262,344,020 | 60,329,274 | 58,204,471 | 7,607,871 | 83,905,369 | 12,744,999 | 31,231,546 |
| 1959 | 258,639,993 | 52,324,475 | 68,382,923 | 5,414,132 | 84,117,061 | 16,781,190 | 18,152,650 |
| 1958 | 260,143,746 | 29,242,703 | 51,911,990 | 7,710,915 | 87,015,958 | 14,938,333 | 10,376,691 |
| 1957 | 225,434,491 | 16,221,641 | 54,609,534 | 6,740,049 | 75,409,154 | *25,437,880 | 9,852,873 |
| 1956 | 298,275,548 | 11,370,908 | 55,321,282 | 17,715,368 | 110,312,286 | 19,060,565 | 9,236,025 |
| 1955 | 214,794,696 | 9,135,410 | 38,835,523 | 13,151,981 | 91,634,512 | 19,774,693 | 7,327,384 |
| 1954 | 219,435,737 | 33,341,057 | 63,087,985 | 10,160,389 | 88,168,431 | 20,400,204 | 7,832,392 |
| 1953 | 273,504,576 | 24,922,950 | 98,170,389 | 17,676,645 | 112,618,121 | 10,541,429 | 4,277,706 |
| 1952 | 331,269,400 | 16,402,023 | 94,030,686 | 9,026,732 | 103,255,409 | 9,682,118 | 3,828,532 |
| 1951 | 317,935,560 | 20,438,084 | 62,090,001 | 10,459,352 | 51,421,618 | 10,027,060 | 5,930,992 |
| 1950 | 197,426,112 | 47,757,262 | 31,260,264 | 6,114,017 | 31,900,099 | 13,535,701 | 3,842,827 |
| 1949 | 280,405,523 | 39,360,503 | 57,157,005 | 13,299,116 | 47,665,283 | 13,652,572 | 2,387,676 |
| 1948 | 231,263,444 | 16,131,654 | 44,910,607 | 7,195,634 | 37,983,694 | 19,762,230 | 750,732 |
| 1947 | 280,376,144 | 16,071,981 | 58,075,105 | 10,138,914 | 38,488,468 | 6,986,030 | 1,061,500 |
| 1946 | 255,783,664 | 4,323,223 | 65,526,783 | 3,770,656 | 34,032,056 | 5,592,645 | 1,368,100 |
| 1945 | 493,942,070 | 7,644,546 | *103,390,392 | 6,502,222 | 50,911,372 | 10,651,463 | 1,138,467 |

*Record year.

## Division of Grain Shipments by Registry of Vessels

Expanding the trend of recent years, foreign vessels achieved their maximum incursion into the Great Lakes grain trade during 1972 with a total of 613 cargoes and 280,590,131 bushels. This participation was an increase of 98 vessels and 39.5 million bushels compared with 1971. Canadian vessels again loaded a majority of the shipments with 995 cargoes representing 623,020,758 bushels.

The participation of United States carriers continued at a low ebb with 154 cargoes having been two greater than in 1971 although volume of 61,512,959 bushels was approximately 870,000 bushels lower. Percentagewise, United States vessels garnered 8.76% of the cargoes, but only 6.37% of the volume.

The appended summary indicates season figures for each of the nationality segments with cargo and bushel units being separated.

| | U.S. Vessels | | Canadian Vessels | | Foreign Vessels | | Total | |
|---|---|---|---|---|---|---|---|---|
| | Cargoes | Bushels | Cargoes | Bushels | Cargoes | Bushels | Cargoes | Bushels |
| Duluth | 151 | 60,214,959 | 38 | 30,942,428 | 244 | 125,592,943 | 433 | 217,050,330 |
| So. Chicago | 1 | 280,000 | 29 | 16,851,000 | 108 | 51,512,000 | 138 | 68,643,000 |
| Thunder Bay | — | — | 782 | 525,078,508 | 127 | 37,677,479 | 909 | 562,755,987 |
| Toledo | 1 | 643,000 | 76 | 32,707,000 | 114 | 55,322,000 | 191 | 88,672,000 |
| Saginaw | 1 | 375,000 | 14 | 4,834,412 | — | — | 15 | 5,209,412 |
| Milwaukee | — | — | 8 | 6,027,500 | 19 | 10,045,782 | 27 | 16,073,282 |
| Wallaceburg | — | — | 36 | 4,604,256 | — | — | 36 | 4,604,256 |
| Huron | — | — | 9 | 1,975,654 | 1 | 139,927 | 10 | 2,115,581 |
| | 154 | 61,512,959 | 992 | 623,020,758 | 613 | 280,590,131 | 1,759 | 965,123,848 |

During 1972, there was a remarkable degree of balance in monthly shipments of grain. The range from May through November, with the single exception of September, was only between 116 and 134 million bushels. While April shipments were approximately 1.7 million bushels less than in the preceding year, forwardings during December increased by 7.4 million bushels to a new record for that month of 90,231,912 bushels. Total cargoes for December expanded to 158 while the volume of grain for direct foreign shipment in the final month of the year increased 46% in comparison with 1971.

Due to large foreign purchases of grain, it was anticipated that movement of foreign vessels to lake ports for loading would be expanded. The season totals show that there were 613 cargoes or an increase of 19% while the volume of 280,590,131 bushels represented an increment of 29%, with both figures representing new records.

The major Canadian grain participation increased by 4.7% to a total of 992 cargoes and 3.1% in volume to 623,020,758 bushels. The U. S. share of the grain movement was substantially the same as in 1971 with the number of cargoes having increased by two while volume was reduced by approximately .9 million bushels.

The summary attached indicates monthly statistics relating to grain shipments with division by vessel registry and a combined total.

| | U.S. Vessels | | Canadian Vessels | | Foreign Vessels | | Total | |
|---|---|---|---|---|---|---|---|---|
| | Cargoes | Bushels | Cargoes | Bushels | Cargoes | Bushels | Cargoes | Bushels |
| April | 6 | 2,836,746 | 43 | 25,155,764 | 6 | 2,924,232 | 55 | 30,916,742 |
| May | 24 | 10,024,938 | 126 | 78,114,495 | 81 | 33,291,135 | 231 | 121,430,568 |
| June | 14 | 5,737,541 | 134 | 83,593,487 | 80 | 36,679,725 | 228 | 126,010,753 |
| July | 17 | 6,837,744 | 120 | 79,171,291 | 76 | 34,421,690 | 213 | 120,430,725 |
| August | 14 | 5,490,496 | 134 | 86,910,892 | 91 | 42,061,745 | 239 | 134,463,133 |
| September | 20 | 8,049,465 | 99 | 61,117,237 | 77 | 36,231,905 | 196 | 105,298,607 |
| October | 17 | 6,543,340 | 112 | 69,555,970 | 85 | 40,389,515 | 214 | 116,488,825 |
| November | 30 | 11,116,755 | 114 | 71,575,653 | 81 | 37,060,175 | 225 | 119,752,583 |
| December | 12 | 4,875,934 | 110 | 67,825,969 | 36 | 17,530,009 | 158 | 90,231,912 |
| | 154 | 61,512,959 | 992 | 623,020,758 | 613 | 280,590,131 | 1,759 | 965,123,848 |

## Port Shipments By Years

Again in 1972 the outstanding achievement was represented by movement of a record volume of 562,755,987 bushels of grain through the Thunder Bay elevators. Thus the past season represented the third year in which Thunder Bay volume has surpassed the one-half billion bushel level.

As mentioned elsewhere, the only other port to reach a new peak was Huron where shipments of 2,115,531 bushels of soybeans were 122% above the previous year.

It will be noted that the ports of Duluth, Milwaukee, and Saginaw showed expanded volume compared with the preceding year, whereas Chicago shipments were at the lowest level since 1967. Toledo and Wallaceburg forwardings were moderately less than in the preceding year.

The accompanying summary indicates grain shipments from each port during all seasons commencing 1945 except, that complementing statistics for Saginaw, Huron and Wallaceburg relate to seasons commencing with 1959.

| | Chicago-So. Chicago | Milwaukee | Toledo | Duluth Superior | Thunder Bay |
|---|---|---|---|---|---|
| 1972 | 68,643,000 | 16,073,282 | 83,672,000 | 217,050,330 | 562,755,987 |
| 1971 | 75,284,000 | 15,465,172 | 91,333,000 | 181,039,653 | 525,067,188 |
| 1970 | 85,287,000 | 14,519,568 | 63,302,000 | 229,734,798 | 470,616,507 |
| 1969 | 85,229,000 | 11,589,375 | 77,201,000 | 140,619,982 | 257,413,786 |
| 1968 | 82,205,000 | 7,015,261 | 87,522,000 | 142,383,601 | 249,249,667 |
| 1967 | 63,810,000 | 2,480,486 | 58,843,000 | 140,935,394 | 367,827,799 |
| 1966 | 89,298,000 | 14,098,030 | 61,353,000 | 221,409,329 | 501,155,187 |
| 1965 | 107,154,000 | 14,570,979 | 60,744,000 | 187,791,243 | 414,302,740 |
| 1964 | 96,239,000 | 10,478,881 | 54,803,000 | 153,385,972 | 446,914,873 |
| 1963 | 79,650,000 | 9,492,381 | 60,255,000 | 172,838,955 | 351,212,775 |
| 1962 | 79,676,000 | 10,454,368 | 56,704,000 | 174,281,146 | 261,681,248 |
| 1961 | 44,513,000 | 7,630,939 | 42,570,109 | 161,839,407 | 330,400,354 |
| 1960 | 43,393,000 | 1,616,670 | 20,250,129 | 167,461,860 | 282,845,578 |
| 1959 | 48,967,243 | 393,500 | 13,677,742 | 149,213,265 | 289,126,892 |
| 1958 | 28,163,592 | 710,983 | 7,882,703 | 99,706,946 | 325,850,353 |
| 1957 | 19,704,066 | 671,496 | 7,670,086 | 105,315,020 | 282,339,718 |
| 1956 | 17,869,609 | 1,657,272 | 7,510,960 | 127,861,948 | 372,671,818 |
| 1955 | 10,134,144 | 1,806,958 | 7,464,450 | 112,731,980 | 266,114,101 |
| 1954 | 24,956,153 | 2,449,010 | 4,364,343 | 118,053,990 | 295,470,855 |
| 1953 | 13,458,339 | 1,788,642 | 4,046,679 | 81,366,232 | 446,268,555 |
| 1952 | 17,870,479 | 2,903,684 | 1,974,474 | 92,569,670 | 456,560,196 |
| 1951 | 21,147,693 | 337,911 | 2,042,536 | 135,893,119 | 321,072,843 |
| 1950 | 32,925,865 | 3,419,839 | 2,865,535 | 92,103,619 | 205,639,175 |
| 1949 | 35,225,439 | 5,712,672 | 1,268,333 | 146,759,016 | 270,754,764 |
| 1948 | 15,887,277 | 4,150,841 | .............. | 118,200,050 | 220,029,390 |
| 1947 | 38,027,566 | 7,287,393 | .............. | 169,692,940 | 256,394,966 |
| 1946 | 15,107,051 | 2,761,222 | .............. | 117,858,977 | 240,169,917 |
| 1945 | 13,123,871 | 5,957,600 | .............. | 171,466,614 | 492,364,092 |

| | Saginaw | Huron | Wallaceburg |
|---|---|---|---|
| 1972 | 5,209,412 | 2,115,681 | 4,604,256 |
| 1971 | 3,597,569 | 952,715 | 4,806,146 |
| 1970 | 2,903,400 | ——— | 4,411,757 |
| 1969 | 4,687,900 | ——— | 2,419,332 |
| 1968 | 6,760,989 | ——— | 2,145,024 |
| 1967 | 4,446,217 | ——— | ——— |
| 1966 | 4,543,313 | ——— | 807,440 |
| 1965 | 5,902,824 | ——— | 896,039 |
| 1964 | 3,778,795 | 403,278 | 1,611,664 |
| 1963 | 3,901,874 | 250,931 | 1,154,796 |
| 1962 | 4,775,877 | 684,555 | 875,874 |
| 1961 | 4,793,649 | 311,509 | 1,440,000 |
| 1960 | 4,495,166 | 454,609 | ——— |
| 1959 | 5,452,000 | ——— | ——— |

## Ports of Destination

In the major phase of the grain trade, volume dispatched to the several ports or ranges increased in each instance with the single exception of the St. Lawrence River where receipts were reported as approximately 25,000 bushels less than in the preceding season. In total, forwardings to Canadian ports aggregated 604,272,252 bushels or an expansion of 13.5 million bushels, thus accelerating the Canadian portion to 62.6% of the Lakes-St. Lawrence Seaway portion of the overall grain movement.

Forwardings to United States ports continued in meager volume having accelerated only 112,000 bushels from the low-level of the previous year. As in 1971, four ports were involved in receipts of grain with reductions in each instance except Buffalo. Forwardings to United States destinations were limited to the shipping ports of Chicago, Duluth-Superior, and Thunder Bay.

The appended summaries show receipts at ports in Canada and the United States together with identification as to volume of each commodity from the several loading ports.

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| | | | | | | | |
|---|---|---|---|---|---|---|---|
| *Toledo:* | | | | | | | |
| Wheat | — | — | — | — | — | 2,199,000 | 2,199,000 |
| Corn | — | — | — | — | — | 19,057,000 | 19,057,000 |
| Soybeans | — | — | — | — | 4,262,000 | 8,352,000 | 12,614,000 |
| *Milwaukee:* | | | | | | | |
| Corn | — | — | — | — | — | 5,564,100 | 5,564,100 |
| Soybeans | — | — | — | — | 360,100 | — | 360,100 |
| Barley | — | — | — | — | — | 103,800 | 103,200 |
| *Saginaw:* | | | | | | | |
| Wheat | — | — | — | — | 372,000 | 2,977,300 | 3,849,300 |
| Corn | — | — | — | — | — | 1,485,112 | 1,485,112 |
| Soybeans | — | — | | | | | |
| *Wallaceburg:* | | | | | | | |
| Wheat | — | — | — | 881,757 | — | — | 881,757 |
| Corn | — | — | — | — | — | 8,477,379 | 8,477,379 |
| Soybeans | — | — | — | 245,120 | — | — | 245,120 |
| *Huron:* | | | | | | | |
| Soybeans | — | — | — | — | 755,608 | 1,220,046 | 1,975,654 |
| | 44,539,085 | 11,630,728 | 7,008,438 | 14,028,715 | 20,235,150 | 506,835,136 | 604,272,252 |

## Grain Shipments to Canadian Ports

| *From:* | To Georgian Bay | To Goderich | To Sarnia | To Pt. Colborne Humberstone | To Toronto | To St. Lawrence Ports | Total |
|---|---|---|---|---|---|---|---|
| *Chicago-So. Chicago:* | | | | | | | |
| Wheat | — | — | — | — | — | 948,000 | [illegible] |
| Corn | 689,000 | — | — | — | — | 10,296,000 | [illegible] |
| Soybeans | 280,000 | — | — | — | 2,925,000 | 1,993,000 | [illegible] |
| *Duluth-Superior:* | | | | | | | |
| Wheat | — | — | — | — | — | 21,686,297 | 21,636,297 |
| Barley | — | — | — | — | — | 7,408,396 | 7,408,896 |
| Rye | — | — | — | — | — | — | — |
| Flax | — | — | — | — | — | 847,486 | 847,486 |
| Corn | — | — | — | — | — | 1,152,248 | 1,152,248 |
| Soybeans | — | — | — | — | — | — | — |
| ***Thunder Bay:*** | | | | | | | |
| Wheat | 34,389,481 | 5,857,087 | 6,795,788 | 11,416,588 | 5,552,205 | 257,464,840 | 320,975,579 |
| Oats | 5,778,788 | 2,688,644 | — | 118,212 | 536,772 | 15,249,348 | 24,311,709 |
| Barley | 1,600,121 | 1,101,261 | — | 997,805 | 4,278,541 | 148,985,835 | 151,964,263 |
| Rye | 122,788 | — | 212,650 | 80,000 | 82,006 | 685,159 | 1,132,558 |
| Flax | — | — | — | 289,233 | 1,160,828 | 691,624 | 2,141,685 |
| Screenings | 1,684,012 | 2,583,086 | — | — | — | 41,666 | 4,258,714 |

## Grain Shipments to United States Ports

| From: | To Buffalo | To Oswego | To Cleveland | To Duluth | Total |
|---|---|---|---|---|---|
| **Chicago-So. Chicago:** | | | | | |
| Wheat | | | | | |
| **Duluth-Superior:** | | | | | |
| Wheat | 44,511,096 | | 1,155,411 | | 45,666,507 |
| Oats | 1,983,815 | | | | 1,983,815 |
| Barley | 4,802,641 | 968,824 | | | 5,771,465 |
| Rye | 7,057,214 | | | | 7,057,214 |
| Flax | | | | | |
| **Thunder Bay:** | | | | | |
| Barley | 260,000 | | | 900,150 | 1,160,150 |
| Oats | 848,908 | | | | 848,908 |
| Rye | 152,221 | | | | 152,221 |
| | 59,615,895 | 968,824 | 1,155,411 | 900,150 | 62,640,280 |

## Grain Shipments By Years

In 1972 Great Lakes grain volume approached the billion bushel level with a record breaking 965,123,848 bushels having been loaded. The component of the other grain categories reached a new peak at 505,173,499 bushels surpassing the one-half billion bushel level for the first time. While wheat shipments gained 50.6 million bushels compared with the preceding year, they were almost 51 million bushels below the 1966 record. Nevertheless, wheat forwardings were the second highest in lake history.

It is interesting that the new overall records were established despite a marked reduction in the normally expanding soybean volume. Reasons for this unusual factor are noted elsewhere in the report.

The appended tabulation indicates grain shipments for each year commencing 1945. Data relating to earlier periods may be found in previous editions of the Annual Report.

| Year | Wheat | Other Grain | Total Grain |
|---|---|---|---|
| 1972 | 459,950,349 | *505,173,499 | *965,123,848 |
| 1971 | 409,380,122 | 498,165,321 | 907,545,443 |
| 1970 | 380,086,029 | 490,989,001 | 871,075,030 |
| 1969 | 270,602,701 | 318,857,734 | 589,460,435 |
| 1968 | 292,328,510 | 284,953,032 | 577,281,542 |
| 1967 | 331,015,853 | 306,827,043 | 637,842,896 |
| 1966 | *510,864,480 | 381,793,819 | 892,658,299 |
| 1965 | 402,436,819 | 388,925,006 | 791,361,825 |
| 1964 | 427,581,600 | 340,032,860 | 767,614,460 |
| 1963 | 365,793,821 | 312,962,891 | 678,756,712 |
| 1962 | 271,589,605 | 307,543,563 | 579,133,168 |
| 1961 | 357,052,499 | 236,546,459 | 593,598,958 |
| 1960 | 262,344,020 | 257,982,982 | 520,327,002 |
| 1959 | 258,639,993 | 248,190,719 | 506,830,712 |
| 1958 | 260,143,746 | 204,747,158 | 464,890,904 |
| 1957 | 225,434,491 | 192,160,177 | 417,594,668 |
| 1956 | 298,278,548 | 230,882,607 | 529,161,155 |
| 1955 | 214,794,696 | 183,455,937 | 398,250,633 |
| 1954 | 219,435,737 | 225,868,614 | 445,304,351 |
| 1953 | 273,504,576 | 273,423,871 | 546,928,447 |
| 1952 | 331,269,400 | 240,609,103 | 571,878,503 |
| 1951 | 317,936,560 | 162,557,542 | 480,494,102 |
| 1950 | 197,426,112 | 139,527,919 | 336,954,031 |
| 1949 | 280,405,523 | 179,314,761 | 459,720,284 |
| 1948 | 231,263,144 | 129,942,232 | 361,205,376 |
| 1947 | 280,376,144 | 136,508,941 | 416,885,085 |
| 1946 | 255,783,664 | 119,613,503 | 375,397,167 |
| 1945 | 493,942,070 | 180,338,482 | 674,280,552 |

* Peak season

## Annual Receipts of Grain at Principal Destinations

Grain receipts at United States unloading ports continued in meager volume during 1972. Buffalo and Duluth both showed increased totals while cargo for Oswego and Cleveland declined. For the second consecutive season, no grain was officially reported as having been received at Detroit.

In Canada, the tremendous export volume provided additional receipts for all of the unloading ports or ranges except the major lower St. Lawrence entity. The sharpest expansion occurred at Port Colborne where unload grain expanded by nearly 63% from the preceding season. Conversely, the lower St. Lawrence receiving elevators took 506,835,136 bushels or a minute 24,580 bushels less than in 1971. This rather surprising development was related to delays in vessel unloading throughout a substantial portion of the season, thus inhibiting the overall capacity of the grain carrying fleet.

The accompanying tabulation indicates port or range receipt data for grain unloaded during each year commencing 1950. Separate tabulations for United States and Canadian areas have been provided.

**United States Ports**

| | Buffalo | Oswego | Erie | Cleveland | Duluth | Detroit |
|---|---|---|---|---|---|---|
| 1950 | 97,422,364 | 7,604,000 | 1,216,655 | 2,758,530 | 4,313,272 | 769,399 |
| 1951 | 141,468,905 | 21,938,378 | 6,609,925 | 2,328,075 | 12,321,240 | 1,080,242 |
| 1952 | 145,771,929 | 12,968,284 | 623,568 | 2,677,070 | 14,988,615 | 690,711 |
| 1953 | 130,520,001 | 9,029,234 | 1,153,624 | 3,061,998 | 18,450,608 | 1,315,836 |
| 1954 | 133,339,185 | 10,951,217 | 2,434,771 | 3,480,516 | 9,279,601 | 1,488,011 |
| 1955 | 94,384,686 | 18,740,345 | 5,079,682 | 4,246,194 | 9,882,844 | 1,956,316 |
| 1956 | 144,428,694 | 12,066,038 | 2,544,207 | 4,064,968 | 11,214,327 | 2,748,656 |
| 1957 | 123,347,389 | 9,627,890 | ........ | 4,921,934 | 7,813,183 | 1,816,525 |
| 1958 | 97,587,789 | 12,520,606 | ........ | 4,331,604 | 5,675,425 | 892,314 |
| 1959 | 82,324,272 | 3,117,354 | 269,000 | 3,515,285 | 3,767,660 | 1,487,338 |
| 1960 | 94,301,633 | 3,296,356 | ........ | 3,827,492 | 3,718,252 | 1,923,455 |
| 1961 | 90,905,506 | 1,983,843 | 274,000 | 3,729,284 | 3,364,574 | 3,000,606 |
| 1962 | 86,989,702 | 1,689,377 | ........ | 3,823,371 | 236,161 | 2,829,422 |
| 1963 | 88,060,397 | 1,962,457 | 466,900 | 4,112,015 | 408,730 | 2,504,042 |
| 1964 | 67,149,632 | 1,126,497 | ........ | 4,354,173 | 1,396,624 | 2,136,840 |
| 1965 | 76,091,382 | 1,165,895 | ........ | 3,454,713 | 347,022 | 2,358,791 |
| 1966 | 80,820,234 | 3,471,178 | ........ | 4,467,336 | 1,006,741 | 1,963,045 |
| 1967 | 67,278,117 | 1,466,500 | ........ | 2,832,230 | ........ | 3,800,509 |
| 1968 | 66,633,498 | 1,254,700 | ........ | 2,530,745 | 640,898 | ........ |
| 1969 | 67,726,171 | 1,273,990 | ........ | 1,847,127 | 650,000 | 4,292,618 |
| 1970 | 71,014,464 | 1,360,329 | ........ | 2,532,226 | 1,129,337 | 2,905,913 |
| 1971 | 58,944,867 | 1,439,470 | ........ | 1,194,460 | 949,727 | ........ |
| 1972 | 59,605,895 | 968,824 | ........ | 1,155,411 | 900,150 | ........ |

**Canadian Ports or Districts**

| | Georgian Bay | Goderich | Sarnia | Port Colborne | Toronto | St. Lawrence |
|---|---|---|---|---|---|---|
| 1950 | 31,393,606 | 18,145,613 | 8,547,803 | 59,410,233 | 20,341,476 | 40,550,250 |
| 1951 | 105,178,288 | 15,848,625 | 12,143,318 | 75,507,010 | 15,660,955 | 35,086,785 |
| 1952 | 177,778,387 | 3,454,349 | 3,207,774 | 112,449,614 | 17,180,063 | 41,072,640 |
| 1953 | 106,474,403 | 22,956,887 | 14,390,278 | 119,510,607 | 23,719,751 | 47,584,591 |
| 1954 | 42,645,907 | 20,678,414 | 11,687,619 | 82,992,522 | 31,380,090 | 63,796,038 |
| 1955 | 62,208,801 | 14,157,789 | 5,401,325 | 99,585,066 | 30,092,465 | 34,526,446 |
| 1956 | 1?4,654,380 | 191,589 | ........ | 112,566,138 | 31,825,339 | 41,653,708 |
| 1957 | ?8,948,363 | ........ | ........ | 88,150,199 | 28,159,810 | 43,829,753 |
| 1958 | 75,134,464 | 20,982,927 | 12,132,152 | 73,629,293 | 31,716,329 | 108,715,354 |
| 1959 | 70,771,090 | 17,365,020 | 8,960,110 | 40,534,801 | 29,332,482 | 116,643,997 |
| 1960 | 61,038,031 | 16,166,856 | 6,800,847 | 30,614,332 | 30,424,982 | 143,715,514 |
| 1961 | 60,040,765 | 15,424,765 | 6,198,224 | 37,746,207 | 27,879,486 | 234,794,850 |
| 1962 | 38,647,247 | 9,127,228 | 3,484,501 | 22,821,966 | 25,775,798 | 227,441,278 |
| 1963 | 43,273,321 | 14,603,495 | 2,819,390 | 26,769,007 | 17,203,815 | 365,484,845 |
| 1964 | 51,042,897 | 13,587,404 | 4,313,959 | 23,845,998 | 27,532,323 | 419,705,608 |
| 1965 | 4?,695,355 | 13,170,048 | 5,531,097 | 13,754,081 | 19,992,456 | 402,318,565 |
| 1966 | 31,788,294 | 14,116,969 | 3,843,467 | 16,961,123 | 23,049,938 | 469,376,105 |
| 1967 | 38,916,116 | 17,279,691 | 4,639,383 | 7,144,021 | 24,128,869 | 308,969,452 |
| 1968 | 26,417,584 | 11,779,086 | 2,039,145 | 7,107,299 | 14,707,364 | 277,004,699 |
| 1969 | 37,412,021 | 13,885,247 | 3,306,739 | 9,869,303 | 22,586,409 | 306,961,483 |
| 1970 | 42,690,763 | 13,807,534 | 4,333,759 | 9,638,857 | 24,688,624 | 545,153,528 |
| 1971 | 37,909,851 | 11,522,436 | 6,643,039 | 8,618,518 | 19,330,718 | 506,860,556 |
| 1972 | 44,539,085 | 11,630,728 | 7,098,408 | 14,023,711 | 20,235,156 | 506,835,136 |

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## Grain Receipts at Buffalo

The season of 1972 was another period of frustration in the Buffalo grain trade. While unload grain increased slightly more than one-million bushels to 48,660,054 bushels, storage volume lessened by two-million bushels to 4,268,522 bushels held in eleven cargoes.

Aggregate grain receipts of 52,868,576 bushels had been exceeded every year since 1885, when receipts were approximately 49.5 million bushels.

The appended tabulation indicates data relating to grain receipts at Buffalo for each year since 1952. A separate column is provided for storage data.

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### Grain Receipts at Buffalo

| | Grain Unloaded Bushels | Winter Storage Bushels | Total Bushels |
|---|---|---|---|
| 1972 | 48,660,054 | 4,208,522 | 52,858,576 |
| 1971 | 47,642,752 | 6,618,501 | 54,261,253 |
| 1970 | 64,714,641 | 6,299,823 | 71,014,464 |
| 1969 | 62,517,423 | 4,791,252 | 67,726,171 |
| 1968 | 60,907,831 | 5,078,543 | 65,986,374 |
| 1967 | 60,343,655 | 7,025,799 | 67,369,455 |
| 1966 | 75,739,475 | 5,788,606 | 81,528,081 |
| 1965 | 68,148,883 | 7,241,441 | 75,390,324 |
| 1964 | 60,479,617 | 6,121,225 | 66,600,842 |
| 1963 | 78,930,801 | 7,963,972 | 86,894,773 |
| 1962 | 76,282,531 | 9,397,389 | 85,679,920 |
| 1961 | 81,202,713 | 9,548,048 | 90,750,761 |
| 1960 | 77,745,817 | 16,555,816 | 94,301,633 |
| 1959 | 73,263,509 | 9,060,763 | 82,324,272 |
| 1958 | 85,938,619 | 11,649,170 | 97,587,789 |
| 1957 | 111,175,069 | 12,172,320 | 123,347,389 |
| 1956 | 131,435,303 | 12,993,391 | 144,428,694 |
| 1955 | 78,366,691 | 16,017,995 | 94,384,686 |
| 1954 | 110,165,754 | 23,173,431 | 133,339,185 |
| 1953 | 113,676,401 | 16,843,600 | 130,520,001 |
| 1952 | 130,497,155 | 15,274,774 | 145,771,929 |

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## Grain Shipments for Side Port Delivery

During 1972, grain moved to other than principal unloading ports was sharply increased to a total of 14,566,587 bushels or approximately 71% higher than in the preceding year. Only the ports of Thunder Bay and Saginaw provided volume with no movement from Duluth-Superior for the first time in many years. Again in 1972, a large proportion of the cargo—nearly 80%—consisted of barley from Thunder Bay to Milwaukee.

The accompanying tabulation includes data relating to side port receipts and shipments with differentiation between ports.

### Side Port Destinations

| Port of Shipment & Kind of Grain | To Chicago | To Milwaukee | To Manitowoc | Total |
|---|---|---|---|---|
| *Thunder Bay:* | | | | |
| Barley | 420,288 | 11,121,714 | 1,893,805 | 13,435,807 |
| Oats | 755,780 | — | — | 755,780 |
| *Saginaw:* | | | | |
| Wheat | 375,000 | — | — | 375,000 |
| | 1,551,068 | 11,121,714 | 1,893,805 | 14,566,587 |

### Off-Lakes Grain Shipments

(Bushels)

| Port of Shipment and Kind of Grain | United Kingdom | Caribbean | Europe | Africa | Maritime Ports | Japan | Near East | Russia | Total |
|---|---|---|---|---|---|---|---|---|---|
| *Chicago-So. Chicago:* | | | | | | | | | |
| Corn | 5,452,000 | 323,000 | 16,195,000 | .......... | .......... | 47,000 | .......... | 13,296,000 | 35,313,000 |
| Soybeans | 265,000 | .......... | 5,758,000 | .......... | .......... | 2,574,000 | .......... | 7,602,000 | 16,199,000 |
| *Duluth-Superior:* | | | | | | | | | |
| Wheat | 6,923,987 | 3,382,293 | 34,143,161 | 4,788,762 | .......... | .......... | 565,879 | 5,086,344 | 54,890,426 |
| Oats | .......... | .......... | 578,500 | .......... | .......... | .......... | .......... | 5,725,728 | 6,304,228 |
| Barley | .......... | 696,517 | 7,945,175 | .......... | .......... | .......... | 2,038,008 | 23,247,214 | 33,926,914 |
| Rye | .......... | .......... | 151,515 | .......... | .......... | .......... | .......... | .......... | 151,515 |
| Flax | 412,907 | .......... | 8,866,890 | .......... | .......... | .......... | .......... | .......... | 9,279,797 |
| Corn | 1,751,853 | 115,000 | 8,194,024 | 94,883 | .......... | .......... | 485,000 | 8,645,872 | 19,287,232 |
| Soybeans | .......... | .......... | 1,686,790 | .......... | .......... | .......... | .......... | .......... | 1,686,790 |
| *Thunder Bay:* | | | | | | | | | |
| Wheat | 1,294,655 | 500,055 | 2,437,317 | 1,845,121 | 4,013,731 | .......... | 1,212,704 | .......... | 11,303,783 |
| Oats | 288,528 | 426,292 | 3,666,363 | .......... | 292,557 | .......... | .......... | .......... | 4,673,740 |
| Barley | 2,037,186 | .......... | 90,723 | .......... | 744,261 | .......... | .......... | .......... | 2,872,170 |
| Rye | 708,363 | .......... | 1,204,080 | .......... | .......... | 1,235,252 | .......... | .......... | 3,147,695 |
| Flax | 122,200 | .......... | 12,022,651 | .......... | .......... | .......... | 137,200 | .......... | 12,282,051 |
| Screenings | 4,811,249 | 24,042 | 2,707,424 | .......... | .......... | .......... | .......... | .......... | 7,542,715 |
| *Toledo:* | | | | | | | | | |
| Wheat | .......... | .......... | 501,000 | .......... | .......... | .......... | 573,000 | .......... | 1,074,000 |
| Corn | 11,805,000 | .......... | 17,535,000 | 411,000 | .......... | 173,000 | .......... | .......... | 29,924,000 |
| Soybeans | 295,000 | .......... | 14,036,000 | .......... | .......... | 8,891,000 | .......... | 582,000 | 23,804,000 |
| *Milwaukee:* | | | | | | | | | |
| Corn | 293,800 | .......... | 3,242,150 | .......... | .......... | .......... | 630,547 | 5,286,235 | 9,452,732 |
| Soybeans | .......... | .......... | .......... | .......... | .......... | .......... | .......... | 592,550 | 592,550 |
| *Huron:* | | | | | | | | | |
| Soybeans | .......... | .......... | 139,927 | .......... | .......... | .......... | .......... | .......... | 139,927 |
| | 36,461,728 | 5,467,199 | 141,101,890 | 7,139,766 | 5,050,549 | 12,920,252 | 5,642,938 | 70,063,943 | 283,848,265 |

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### Off Lakes Grain Shipments

Reflecting the impetus of expanded overseas grain sales by both Canada and the United States, a new peak level was reached in the direct movement of grain from Great Lakes ports to off-shore designations with a total of 283,818,265 bushels having been loaded. This represented an increase of 38.5 million bushels or 15.7% more than in 1971.

Volumewise, Duluth-Superior continued to provide the largest proportion with a total of 125 million bushels. Toledo was in second place with 54 million bushels, followed by Chicago with 51 million bushels and Thunder Bay with 41 million bushels. Additional participants in the trade were Milwaukee and Huron.

An examination of destination data shows that Europe, other than Russia, continued as the largest single customer although its receipts were approximately 34-million bushels less than in the preceding year. Commencement of deliveries on the much publicized Russian purchases were represented by shipments of 70,063,943 bushels originating on the Great Lakes. This total compared with only 3,883,482 bushels in the preceding year. All of the usual receiving areas continued active during 1972.

Corn continued to provide the largest segment of the export movement with 93,976,964 bushels. It was followed by wheat with 67,268,209 bushels; soybeans with 41,829,717 bushels and barley with 36,799,084 bushels. Other grains participating in these shipments were oats, rye, flax and screenings.

The appended summary indicates statistics relating to off-shore destinations insofar as grain shipments are concerned. Also included are data for individual ports of shipment and grain components.

### Grain Held in Storage Cargoes

Despite the record-breaking 1972 movement of grain over the Great Lakes, the holding of staples in winter storage showed a downward trend with 64 cargoes and 36,549,166 bushels having represented the least storage consignments since 1968, when aggregate grain shipments were nearly 400-million bushels less than during the past season.

Examination of storage data shows that United

States participation of 5,099,933 bushels was the least for any season since these data were initiated in 1940. In contrast, Canadian storage cargoes of 31 449,233 bushels were the second highest since 1967 although substantially lower than the record-breaking holdings of the preceding winter.

In Canada, grain was held at a total of 12 lake and St. Lawrence River ports plus one cargo at St John's, Nfld. Four vessels were holding winter cargoes at Thunder Bay preparatory to movement during the 1973 season. The largest fleet was represented by eight vessels with 6,410,565 bushels at Port Colborne, including three cargoes in excess of one-million bushels each. The continuance of large vessel utilization for holding Canadian storage grain is indicated by data reporting that the Canadian Progress, Canadian Leader, A. S. Glossbrenner, Frankcliffe Hall, Lake Manitoba and Quebecois were all in the plus million bushel category.

At United States ports, storage cargoes were held only at Cleveland and Buffalo with the total of 14 loads having been ten less than in the preceding winter.

The appended statistics indicate storage cargoes at U. S. and Canadian ports. A supplementary tabulation provides distribution of such cargoes by vessels and nationalities during each season commencing 1955.

**Grain Held in Storage Cargoes**
**In Vessels of U. S. Registry**

| Port | Cargoes | Bushels |
|---|---|---|
| Buffalo | 11 | 4,208,522 |
| Cleveland | 3 | 891,411 |
| | 14 | 5,099,933 |

**In Vessels of Canadian Registry**

| | Cargoes | Bushels |
|---|---|---|
| Georgian Bay | 9 | 4,273,894 |
| Goderich | 6 | 2,069,732 |
| Sarnia | 5 | 4,043,605 |
| Port Colborne | 8 | 6,410,565 |
| Hamilton | 4 | 3,283,316 |
| Toronto | 9 | 5,284,814 |
| Kingston | 1 | 916,685 |
| Prescott | 2 | 994,890 |
| Montreal | 5 | 4,012,880 |
| St. John's Newfoundland | 1 | 196,362 |
| | 50 | 31,449,233 |

**Grain Held In Storage Cargoes**

| Year | | United States Cargoes | United States Bushels | Canadian Cargoes | Canadian Bushels | Total Cargoes | Total Bushels |
|---|---|---|---|---|---|---|---|
| 1972 | ........ | 14 | 5,099,933 | 50 | 31,449,233 | 64 | 36,549,166 |
| 1971 | ........ | 24 | 7,519,506 | 58 | 41,386,025 | 82 | 48,905,531 |
| 1970 | ........ | 19 | 7,426,720 | 49 | 29,296,169 | 68 | 36,722,889 |
| 1969 | ........ | 15 | 6,016,326 | 52 | 30,997,575 | 67 | 37,013,901 |
| 1968 | ........ | 15 | 6,254,753 | 38 | 21,185,689 | 53 | 27,440,442 |
| 1967 | ........ | 21 | 8,647,463 | 59 | 33,952,400 | 80 | 42,599,863 |
| 1966 | ........ | 19 | 7,902,842 | 73 | 32,846,893 | 92 | 40,749,735 |
| 1965 | ........ | 24 | 9,042,689 | 59 | 26,995,141 | 83 | 36,037,830 |
| 1964 | ........ | 21 | 7,973,365 | 82 | 31,432,948 | 103 | 39,406,313 |
| 1963 | ........ | 27 | 9,910,857 | 84 | 34,107,829 | 111 | 44,018,686 |
| 1962 | ........ | 28 | 11,090,144 | 95 | 33,782,196 | 123 | 44,872,340 |
| 1961 | ........ | 35 | 12,980,607 | 90 | 30,864,101 | 125 | 43,844,708 |
| 1960 | ........ | 48 | 18,555,683 | 80 | 25,048,358 | 128 | 43,604,041 |
| 1959 | ........ | 40 | 13,238,354 | 62 | 20,593,399 | 102 | 33,831,753 |
| 1958 | ........ | 38 | 14,951,271 | 90 | 23,373,789 | 128 | 38,325,060 |
| 1957 | ........ | 43 | 14,003,743 | 84 | 23,065,127 | 127 | 37,068,870 |
| 1956 | ........ | 49 | 16,346,375 | 79 | 23,025,182 | 128 | 39,371,557 |
| 1955 | ........ | 63 | 18,768,704 | 90 | 23,974,698 | 153 | 42,743,402 |

through him we operate a ship that he has obtained for us under time charter from Portland and Seattle down to Oakland. Through him we operate a vessel under lease transporting grain from the Gulf ports to our plants in Puerto Rico. Through him we occasionally take out time charters on vessels to ship flour from the Gulf ports into the Caribbean.

Q I see. You're talking about salt water shipping as distinguished from Great Lakes shipping as far as this is concerned.

A Yes, sir.

Q I see. Now, there was testimony earlier in the case that the Erie Lackawanna offered Conagra a unit train rate from Buffalo to Martins Creek at 34 cents per hundredweight if Conagra would furnish the cars. Was that offer made to you?

A Presumably, yes. I recall --

Q What do you mean, "presumably"?

A Well, I don't really recall the proposition per se because it's ridiculous in terms of the economics of it, and it would be dismissed and forgotten about if that proposition were made.

Q Was it made written or orally, or how was it made?

A It would have had to have been orally.

Q By telephone, or what?

A Yes, sir -- it could have been in personal contact. I don't know.

Q Well, why do you say it's economically ridiculous?

A Well, because Mr. Barber, if you'll remember, also said that package of 34 cents was without any mileage compensation. A grain hopper car of the capacity that we use will cost roughly $235 to $255 per car per month. This is a substantial sum when you have no compensation coming back to offset that rental cost.

If a car were transporting 3,300 bushels or 3,400 bushels, that would translate to something like 7 cents a bushel additional costs, which is astronomical. It's higher than what we're doing today at 40 cents and no costs.

Q It would be 7 cents a bushel, you say?

A Close to it, yes.

Q All right. And how much per hundredweight?

A Eleven and a fraction cents.

Q Eleven cents?

A Over eleven. So 34 and 11 is 45.

Q Well, Mr. Stone, using the figures in your own statement, the vessel rate of 16 cents equates to --

A Point two-six-six-seven hundred.

Q And adding the 5 cents charge, 34 cents and 11 cents --

A That's 31.

Q Thirty-one?

A Point two-six-six-seven plus oh-five totals twenty-three one-six-seven.

Q All right. And then you add the 34 cents, and it seems to me you're going to -- that even with your 7 cents a bushel allowance, you're going to go over the lesser rate.

A No. You're comparing bushels and hundredweights. Let's keep it all in hundredweights.

Q All right. Then add the 11 cents then.

A The 34-cent rate the Erie Lackawanna offered to Conagra would attach to it eleven and a fraction cents per hundredweight car leasing costs, which we would have to equate to the actual transportation cost to evaluate the merit of it. So you're talking about over 45 cents where today we have 40 cents and we don't have to supply the car.

Q Well, if you add up those figures, you come up with a total of 76.67 cents, which is exactly midway between the proposed summer and winter Martins Creek rates.

Well, isn't that much more attractive than the 88 cents?

A In the winter months you're paying 43 cents to get it in, so you tack 43 cents and add to that 5 cents for elevation, which is 48 cents, and tack on to that the 41-cent rate, the 34 plus 11 is 45, and we're talking ninety-something cents.

Q Oh, no, no.

Judge White: Let's go off the record for a moment.

(Discussion off the record.)

Judge White: Let's go back on the record.

Q Have you actually, physically, inspected those way bills yourself?

A Yes, I have.

Q How many of such way bills, approximately, have you inspected?

A About 25 out of the 30 trains that have moved.

Mr. Donelan: What was the comment after 25?

The witness: Out of the 30 trains that have moved so far this year.

Q (By Mr. Peterson) These are way bills which show the billing that was cancelled, or applied and what the rate level is?

A That is correct.

Q Specifically now, what information as to the rate level of the traffic moved was shown on those way bills?

A The rate that's shown on the way bills that I inspected was 41 cents a hundred weight, backed up by transit billing that moved from the country during the period that the 41 cent rate from Duluth to Buffalo would apply.

Q 41 cents, in other words, covering the movement of all of the traffic that moved during --

A The inbound traffic --

Q -- that moved during the '73 - '74 season on the Soo Line?

A The inbound transit billing would govern the rates that